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Overlapping human rights jurisdictions in Europe

an application of constructivism to regional studies

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5/1/2010

Advisor: Ben Schiff
Politics Senior Honors Thesis

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Introduction

i. The Problem

The European human rights regime is currently defined by the entanglement of two formerly parallel institutions. First, the Council of Europe’s European Convention of Human Rights, which sets out the legal rights of individual Europeans. Second, the European Union’s Charter of Fundamental Freedoms, which also sets out the legal rights of European individuals.

The Council of Europe was founded in 1948 as an intergovernmental organization— a regional United Nations (“UN”) without a Security Council. Its primary function since then has been the protection of human rights through its judicial organ, the European Court of Human Rights (“ECtHR”).

The European Union was founded out of the European Communities in 1993 as a supranational government with limited competences— its members must be party to the European Convention of Human Rights (“ECHR”). Since 1951, the Courts of the European Communities¹ only had authority over areas directly related to the economic integration of European states. As of December 2009 the Lisbon Treaty extended the Union’s limited competences to the protection of the Charter of Fundamental Freedoms.

These formerly parallel institutions have now grown into each other. The Council’s judicial organ (the Strasbourg-based European Court of Human Rights) and the Union’s judiciary (symbolically manifest in the Luxembourg-based European Court of Justice) have a potentially serious jurisdictional conflict in and over European Union member states.

This paper seeks to establish what the Courts are and what they do in the eyes of their constitutive parts (the individual, the state, and the institution), identifying the nuances of the problem as perceived by the actors who engage it. It then identifies alternative developmental

¹ Represented in this paper as its highest court, the European Court of Justice (“ECJ”).

paths, and predicts the most likely outcome. To do this, this paper employs ideas from Ian Hurd's and Alexander Wendt's theories of legitimacy and anarchy in the international system.² Their constructivist visions focus on how actors address each other during problem-solving activities. How this interaction occurs, they argue, fundamentally informs the outcome of the problem solving. This paper, therefore, places itself as a regional application of the constructivist theory.

ii. *Methodology*

Hurd and Wendt explore how actors identify and pursue interests by wielding symbols in the international system.³ The international system is the collection of actors who engage individuals, states, and institutions that hold some form of sovereign authority. Sovereign authority originally derived from a medieval political application of theology, and is the ability to hold final authority over a geographic area in the control of a singularly interested actor.⁴ Actors identify their interests, Hurd and Wendt argue, through complex interactions with their external realities constrained by perceived social norms. Since actors are constantly interacting with the international system as they perceive it, there exists a feedback loop where actions and reactions change an actor's perceptions. Therefore to identify how an actor perceives and pursues its interest, one is necessarily trying to hit a moving target.

² Wendt, Alexander. "Anarchy is what states make of it: the social construction of power politics" *International Organization* 46, 2, Spring 1992. pp 391-425; Hurd, Ian. *After Anarchy: Legitimacy & Power in the United Nations Security Council*. (Princeton, New Jersey: Princeton University Press, 2007).

³ In this paper, the term "Interest" is used interchangeably with "interest structure." I use both terms to describe the internal set of outcomes that an actor first organizes along a good/bad dichotomy and secondly organizes by level of preference. When an actor "rationally pursues its interests" I mean to say an actor "pursues those positive outcomes which it prefers over other positive outcomes." What the first lacks phrase lacks in explicit accuracy it makes up in brevity.

⁴ Kantorowicz, Ernst Hartwig. *The King's Two Bodies: A Study in Mediaeval Political Theology*. (Princeton, N.J.: Princeton University Press 1957)

Ian Hurd identifies a moving object with which he can hit the moving target. Hurd's analysis of the UN Security Council rests on the examination of actors' usage of symbols. For Hurd, actors express their perceptions of the international system when they wield symbols to coerce another actor. Since symbols are subjective representations of an idea, their usage identifiably adjusts with the feedback loop. The identification of a rationally deducible logic for an actor's usage of a symbol in the context of its usage also identifies the premises on which the logic rests. These premises are the fundamental aspects of how a state perceives the ontological reality of a situation.

Symbols, as subjective representations of an idea, are open to changing definitions according to their usage. By using a symbol an actor attempts to invoke the set of principles that the actor perceives accompany it. However, actors can interpret or define a symbol differently. When actors differ over a symbol's definition, a conflict between the definitions arises and the symbol evolves. Either one definition becomes accepted and the others fall by the wayside, or a new definition is created. Depending on what actors agree to use at a given moment, the symbol collects the various perceptions of actors either in conflict or in consensus.

Thus, by identifying the conflict or consensus of a symbols' definition at a given moment, one can also identify the premises that presuppose an actors' symbol usage. Having gathered the assumptions of various actors, we can then draw conclusions on how these perceptions of reality interact.

Hurd provides an example of this analytical method when he examines the usage of the UN's light-blue and white insignia by national troops during UN peacekeeping operations. Hurd shows that this symbol functionally legitimates the troops' role as peace-keeping members of the international community. Without it, operations labeled as peace-keeping missions lack the

symbols' socialized meaning and are not believed by other states. In applying the UN's insignia to helmets and vehicles, he argues, a state relates its troops' presence in a different territory to the UN's international community. According to Hurd a state usually conceivably does this to justify their troops' presence in a different state for the sake of their individual troops' safety and for the sake of the states' international image as a team-player. However the usage is justified within the state it nonetheless presupposes that invoking the UN's insignia provides legitimacy for the acting state. Hurd argues that the definition of the UN's symbol is built by an existing social consensus among all relevant actors.⁵

This method for analysis turns on the assumption that an actor will actively and rationally pursue the outcome which best aligns with its identifiable interest structures. Interest structures, are the set of identities that an actor perceives to hold normative value. What an actor defines as 'good' holds normative value, whereas an action, situation, other agent that an actor defines as 'bad' does not. The level of complexity differentiates an actor's 'interest structure' and an actor's 'interests.' An actor's 'interests' imply an immutable set of identities that are exogenously given by the actor's nature. An actor's interest structure is instead the combination of an actor's nature and its experience. It describes the relationship between an actor's inherent interests to an actor's changing interests— what they assume versus what they learn. Thus, the rational pursuit of one's interest structure implies that an actor takes action when it perceives an action's necessity to realize its internal value structures.

For example, if the US wants to protect the international peace and status quo, and perceives that the only way to do this is to by any means disallow Iraq from invading Kuwait, the US will wage war in the short term to achieve its policy objectives. Assuming that sending

⁵ Hurd. pp 124-128

domestic troops to a foreign land to wage a foreign war is not in the US leaders' domestic interests, the relationship of the two interests motivates the actor's actions.

iii. The Paper Structure

This paper compares regional actors' usages of symbols during the two fundamental life stages of the European Court of Human Rights ("ECtHR") and the European Court of Justice ("ECJ"). The first stage identifies how interested actors collectively define a court's purpose (its perceived *telos*) during the time leading up to a court's constitution. This analytic process 'identifies what the courts *are*.' The second stage identifies how interested actors collectively defined the courts' *telos* during its functioning. This analytic process 'identifies what the courts *do*.' Each stage of analysis identifies the actors involved and how they used relevant symbols to interact. The actors this paper studies are the individual, the state, and the institution.

This paper proceeds in four chapters. The first chapter defines the institutions and justifies the paper's theoretical approach. The second chapter is a case study of the European Convention of Human Rights ("ECHR") and the European Court of Human Rights ("ECtHR"). The third chapter is a case study of the Charter of Fundamental Freedoms ("the Charter") and the European Court of Justice ("ECJ"). The final chapter analyzes the relationships of these two institutions relative to their actors.

Chapter I first organizes the Council of Europe and the European Union as regional structures. The chapter then justifies the study of regional international courts and this paper's usage of constructivism.

Chapter II relates what the ECtHR is (its constitutive *telos*) to what it does (its functional *telos*) in two stages. The first stage inspects the progression of symbolic conflict between states during the deliberations in the Council of Europe on the European Convention of Human Rights. The first stage finds that states conflicted over the relationship of the Council of Europe to the UN, the limitations of protectable individual rights, and the enforcement mechanism to protect these rights. It shows that internal conflict persisted until member states found consensus through the conflict in the UN between the European regional identity and the global identity of the need for individual right protection.

The second stage of chapter II analyzes the Courts' jurisprudence concerning the margin of appreciation doctrine and its proportionality tests. These principles are the symbols that the Court uses to define its jurisdiction in the face of a member state's jurisdictional challenge. The second stage shows that the ECtHR initially interpreted these principles broadly to defer to states, but has since then gradually narrowed its interpretation. The second chapter then concludes by identifying the relationships between these stages, and what the ECtHR is today for European individuals, states, and institutions.

Chapter III relates what the ECJ is to what it does in two stages. The first stage analyzes the supremacy⁶ and the direct effect doctrines in ECJ jurisprudence. The Court uses these doctrines to communicate its role in vis à vis member state jurisdictional challenges. This stage concludes that the ECJ has categorically refused to defer to the legal jurisdictions of member states. Rather, it subverts member state court systems and expands its jurisdictions to the extent of the Community's competences.

The second stage of chapter III examines how non-state actors used the symbols of socio-economic rights and enforcement mechanisms in the creation of the Charter of Fundamental

⁶ Called elsewhere the 'primacy principle'

Freedoms' intergovernmental conference. This stage shows firstly that more actors affected the Charter's constitution than the ECHR's constitutional process. It shows secondly that processes of regional identity-formation built a consensus that the Charter would protect rights greater than or equal to those in the ECHR, and that the ECJ would enforce these rights. The third chapter concludes by identifying the relationships between these stages, and what the ECJ is today for European individuals, states, and institutions.

Chapter IV relates the findings of the second and third chapters to compare the Courts and the nature of their jurisdiction in the eyes of individuals, member states, and the other Court. It then identifies potential solutions to the jurisdictional problem, and predicts the most likely outcome—

The European Union will, as an institution, use its new international legal personality to accede to the ECHR and become subject to the ECtHR's jurisdiction. The ECJ will construct a symbol to define a monist hierarchy of human rights jurisdictions ascending from EU member states to the ECJ and then to the ECtHR. The ECJ will maintain its position as the head of a monist hierarchy in those areas of community law where the ECtHR does not have jurisdiction. In doing so, the EU may help the ECtHR legitimately expand the rights protected by the ECHR. However, this potential expansion of rights in the ECHR area depends on the reactions of the Council of Europe's non-European Union members.

Chapter I. Definitions and theory

This chapter defines the relevant institutions and justifies the paper's theoretical approach.

The first section organizes for the reader the institutional structures of the Council of Europe and European Union. The second section defends the usage of international courts in a regional case study. To conclude the chapter, the third section defends the usage of constructivism to study the courts.

i. The European regional political institutions

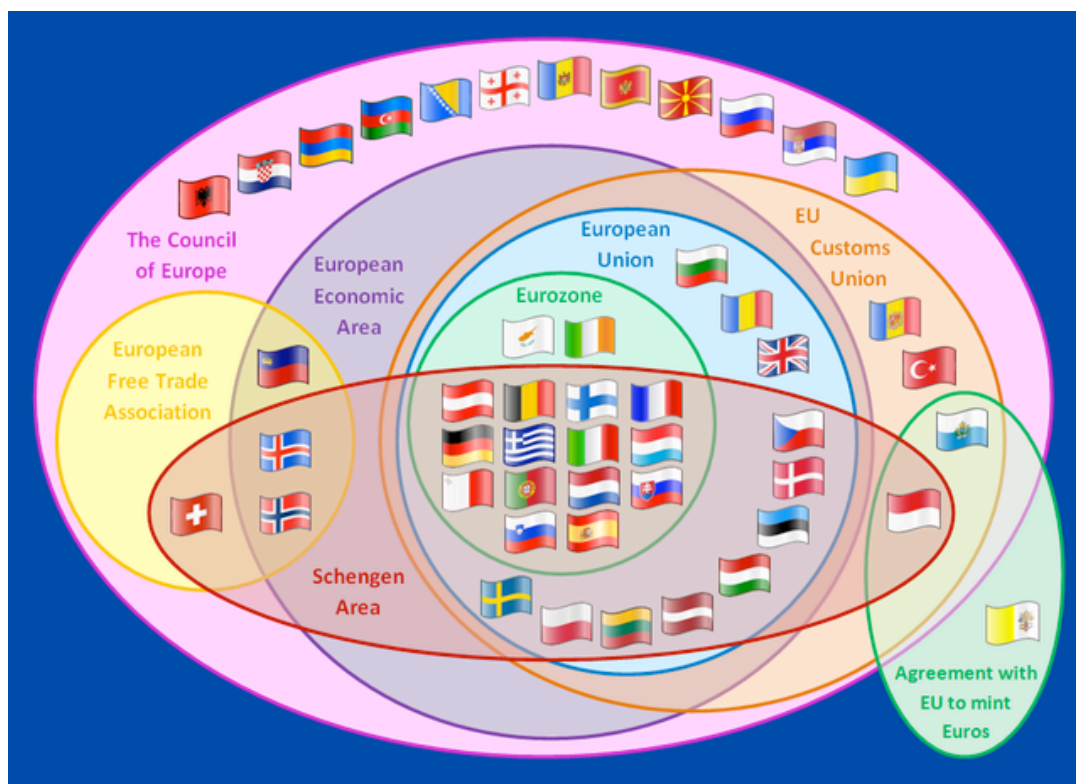


Diagram 1. The European Regional Political Structure (April 2010).⁷

⁷ http://en.wikipedia.org/wiki/Template:Supranational_European_Bodies (n.b. The diagram has been fact-checked)

The European Free Trade Association, founded in 1960, is an association of states committed to free trade principles. The Schengen Area are states who share border control policies and allow freedom of movement between states internally. The European Economic Area allows for free trade between EFTA states and the EU. The Eurozone are those states who use the Euro as their national currency. The EU Customs Union allows for free trade between EU member States and potential members and controls external custom rates.

This section provides a brief overview of how the Council of Europe and the European Union are organized and introduces their relevant actors, terminology, and processes.⁸ It portrays the institutional structures, the interrelationship of their organs, the day-to-day functions, and relevant historical trends.⁹ (See Diagram 1).

The subsection on the Council of Europe describes the Council's organs, the Council's procedures, and then surveys its notable achievements.

The subsection on the European Union describes the history of its treaties and its membership. It then describes the Communities' institutional structure and legislative process. It concludes by clarifying a common conceptual problem regarding the Union's development.

⁸ The sources these sections are primarily based on: Hix, Simon. *The Political System of the European Union*. The European Union Series, 2nd ed. (New York, New York: Palgrave Macmillan, 2005); McCormick, John. *Understanding the European Union*. The European Union Series (New York, New York: Palgrave Macmillan, 2002); and Nugent, Neil. *The Government and Politics of the European Union* 6th ed. The European Union Series (New York, New York: Palgrave Macmillan, 2006).

⁹ The European Union has led to a great deal of scholarship focused on how regional constitutional processes function. See, for example, Ansell, Christopher K. and Giuseppe Di Palma, eds. *Restructuring Territoriality: Europe and the United States Compared*. (Cambridge: Cambridge University Press, 2004); Baimbridge, Mark, Brian Burkitt and Philip Whyman, eds. *The Impact of the Euro*. (New York, New York: St. Martin's Press, 2000); Christiansen, Thomas and Christine Reh, *Constitutionalizing the European Union* (New York, New York: Palgrave Macmillan, 2009); Chrysoschoou, Dimitris N. *Theorizing European Integration*. (New York, New York: Routledge, 2009); Eriksen, Erik Oddvar and John Erik Fossum "Europe in Search of Legitimacy: Strategies of Legitimation Assessed" *International Political Science Review / Revue internationale de science politique*, Vol. 25, No. 4 (Oct., 2004), pp. 435-459 Stable URL: <http://www.jstor.org/stable/1601608>; McCormick, Neil, "Democracy, Subsidiarity, and Citizenship in the European Commonwealth"; Meehan, Elizabeth M. "European Integration and Citizens' Rights: A Comparative Perspective" *Publius*, Vol. 26, No. 4 (Autumn, 1996), pp. 99-121 <http://www.jstor.org/stable/3330773>; Menéndez-Alarcón, Antonio. *The Cultural Realm of European Integration: Social Representations in France, Spain, and the United Kingdom*. (Westport, Connecticut: Praeger Publishers, 2004); Schäffner, Christina, Andreas Musolff, and Michael Townson. "Diversity and Unity in European Debates" in *Conceiving of Europe: Diversity in Unity* (Brookfield, Vermont: Dartmouth University Press, 1996); Stone Sweet, Alec. *The Judicial Construction of Europe* (New Haven, Connecticut: Yale University Press, 2004); and Szczerbiak, Aleks and Paul Taggart. *Opposing Europe?: The Comparative Party Politics of Euroscepticism*. Volumes I and II. (Oxford: Oxford University Press, 2000); Weber, Katja, Michael E. Smith, and Michael Baun, eds. *Governing Europe's Neighbourhood: Partners or Periphery?* (Manchester: Manchester University, 2007)



Diagram 2. The Council of Europe's Membership¹⁰

A. The Council of Europe and the European Court of Human Rights

The Council of Europe is an intergovernmental political forum for human rights. It mainly discusses, expands, and enforces the European Convention of Human Rights. This section first surveys the membership and organizational structure of the Council of Europe, and then outlines historical trends.

The Treaty of London (also known as The Statute of the Council of Europe) founded the Council of Europe in 1949. Originally, the Council's membership included only ten states: Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden and the United Kingdom. Today, the Council consists of 47 member states. Several Non-European states observe its proceedings (Mexico, Japan, Canada, the U.S., and the Vatican). Every

¹⁰Council of Europe. Accessed last 17 April 2010 at <http://www.coe.int/aboutCoe/index.asp?page=47pays1europe&l=en>

member state of the European Union is also a member of the Council of Europe, but not all members of the Council of Europe belong to the European Union.

The Council of Europe is organized into the Committee of Ministers, the Parliamentary Assembly,¹¹ the Congress of the Council of Europe, the European Court of Human Rights, the Commission for Human Rights, and the Conference of the INGOs.

The Parliamentary Assembly elects a Secretary General to a five-year term and appoints the secretariat. The position was included in the original Treaty of London. The Secretary General oversees the day-to-day bureaucracy of the Council of Europe, and shapes general goals for the Council each year.¹²

The Committee of Ministers was founded in the Treaty of London. In the two years following the Treaty of London, the Committee controlled the agenda of the Consultative Assembly. At that point, the Parliamentary Assembly was called the Consultative Assembly. In 1951, the Committee passed an amendment to the Treaty that reserved this authority for the Assembly.¹³ Membership in the Committee of Ministers is technically reserved for the member states' top foreign ministers. However, most members of the Committee are individuals whom the Council has accredited to represent member states' foreign ministers. The Committee of Ministers now admits new member States, concludes conventions, gives recommendations to member states, adopts the budget, monitors the Council's program of activity, and supervises the execution of the European Court of Human Rights' judgments. It meets in Paris.¹⁴

¹¹ The "Consultative Assembly" until 1994

¹² Council of Europe. "Regulations relating to the Appointment of the Secretary General" Accessed last 17 April 2010 at <https://wcd.coe.int/ViewDoc.jsp?Ref=RegulationsSG&Language=lanEnglish&Ver=original&Site=COE&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75>

¹³ Amendments to the Statute of the Council of Europe. Accessed last 16 April 2010 at <http://conventions.coe.int/treaty/en/treaties/html/001.htm#FN2>

¹⁴ The Council of Europe. "About the Committee of Ministers" Accessed last 16 April 2010 at http://www.coe.int/t/cm/aboutCM_en.asp

The Parliamentary Assembly (“PACE”) comprises 321 national parliamentarians from member states, who are represented on the basis of population size. Each state selects its method to designate its Assembly representatives. The Assembly was founded in the Treaty of London as the Consultative Assembly. In 1951, after the Committee of Ministers passed the first amendment to the Statute of the Council of Europe, the Assembly could set its own agenda. The Parliament consults member states and the committee of ministers on regional issues, and can pass recommendations, resolutions and opinions. These are non-binding on member states, so the Assembly functions primarily as a political forum for human rights protection. The Assembly meets 4 times a year in Strasbourg.¹⁵

The Congress of the Council of Europe was established in 1994 to represent local and regional authorities in the member states. It is composed in the same way as the Parliamentary Assembly. It is also primarily a political forum without any binding capabilities. It also meets in Strasbourg.¹⁶

The European Court of Human Rights was established in 1950 by the European Convention on Human Rights. The Court and the Convention together have become the centerpiece of the Council of Europe’s activities. The Court comprises a judge from each member state elected by the Parliamentary Assembly. After the passage of Protocol 14 to the European Convention of Human Rights, judges serve a 9-year non-renewable term. Within the Court, judges are organized into five sections that are each led by a Section President. The Court as a whole elects the Court’s President and each Section President. Cases are heard either by a section’s chamber of 6 rotating judges plus the section president or the Courts’ grand chamber of

¹⁵ The Council of Europe “Pace in Brief” accessed last 16 April 2010 at http://assembly.coe.int/Main.asp?Link=/AboutUs/APCE_structures.htm

¹⁶ The Council of Europe. “All About the Congress” accessed last 16 April 2010 at http://www.coe.int/t/congress/presentation/default_en.asp

17 members. The grand chamber includes the President of the Court, the Section Presidents, and a rotating selection of justices from two judge pools which alternate every nine months. The grand chamber typically hears highly politicized cases. The Committee of Ministers is responsible for the enforcement of all Court decisions.¹⁷

The Commissioner for Human Rights was established in 1999. The Parliamentary Assembly elects a Commissioner for a non-renewable six-year term. The Commissioner can contact governments of member states and issue recommendations, opinions and reports. The position acts primarily as a visible, political advocate for the protection of the ECHR's human rights.¹⁸

The Conference of INGOS was established in 2003 as a forum for dialogue between regional NGO's recognized by the Committee of Ministers. Today, it consists of 400 NGOs. The Conference discusses contemporary issues with the Committee of Ministers, the Parliamentary Assembly and the Congress of the Council of Europe, but has no policy capabilities. It meets during the Parliamentary Assembly's ordinary sessions in Strasbourg.

The Council of Europe primarily ran the ECtHR and protected the individual human rights of European citizens for most of its existence. Its forums for political discussion fundamentally revolve around this purpose. The latest major achievement of the Council of Europe was the passage and revision of the European Social Charter on 18 October 1961¹⁹ and 3 May 1996.²⁰ The Social Charter sets out the socio-economic rights of individuals in a non-

¹⁷ Mowbray, Alastair. *Cases and Materials on the European Convention on Human Rights*. Second Edition (Oxford, England: Oxford University Press, 2007); and Ovey, Clare and Robin C.A. White, *Jacobs & White, The European Convention on Human Rights*, 3rd ed (Oxford: Oxford University Press, 2002)

¹⁸ The Council of Europe. "Overview of Activities." Accessed last 17 April 2010 at http://www.coe.int/t/commissioner/Activities/overview_en.asp

¹⁹ The Council of Europe. *The European Social Charter (1961)*. Accessed last 2 May 2010 at <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=035&CM=1&CL=ENG>

²⁰ Ibid. *The European Social Charter (1996)*. Accessed last 2 May 2010 at <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=163&CM=8&CL=ENG>

binding document. Therefore, the Council of Europe is primarily a meeting space for European states, individuals, and organizations. For the human rights regime, this means that the Council of Europe is a primary arena in which actors interact. These interactions are studied in Chapter II.

B. The European Union and the European Court of Justice

The European Union is a supranational government that operates by the consent of the governed with limited competences. Member States and their citizens delineate these competences by creating, signing, and incorporating into national law the Union's founding treaties. These treaties are typically built by the Union's organs, and then consented to and ratified by national governments, parliaments, and citizens. EU organs also use treaty provisions to create secondary laws that legitimately constrain member states.

This section first describes the history of the Union through its treaty formation and the growth of its membership. It then surveys the Union's institutional structures and legislative processes. It concludes by questioning the assumption that the Union's deeper integration and broader growth pattern is limitless.



Diagram 3. The Membership of the EU²¹

i. *The history of the European Union*

The institution that today is called the European Union (“EU”) began in 1952 as the European Coal and Steel Community (“ECSC”). The Treaty of Paris²² established this community for the stated purpose of integrating fundamental industries in Europe. The Treaties of Rome²³ established in 1957 the European Economic Community (“EEC”) and the European

²¹ One World - Nations Online “Map of the European States” last modified: Thursday, 22 April 2010. Accessed last 1 May 2010 http://www.nationsonline.org/oneworld/europe_map.htm.

The legend reads: Yellow-EU member states; light orange-EU new members 2004; dark orange- EU new members 2007; pinkish orange- EU Candidates; green- EFTA member states

n.b. the pink are states unrelated to the EU

²² *Treaty Constituting the European Coal and Steel community*. 1952 Accessed last 2 May 2010 at www.ena.lu

²³ *The Treaties of Rome*, 1957 Accessed last 2 May 2010 at www.ena.lu

Atomic Energy Community (“EAEC” or “Euratom”). The Merger Treaty²⁴ combined these institutions into the European Community (“EC”). In 1987, the Single European Act (“SEA”)²⁵ set the establishment by 1992 of a common European market as the EC’s primary goal. During the five years after SEA, the EC developed the three-pillar structure and established the European Union in 1992 with the passage of the Maastricht Treaty (also known as The Treaty on European Union “TEU”).²⁶ After the TEU, two treaties amended the EU’s procedural structure: the Treaty of Amsterdam (“Amsterdam”)²⁷ in 1997 and the Treaty of Nice (“Nice” or the Treaty on the Functioning of the European Union “TFEU”) in 2000.²⁸ The TEU, Amsterdam and Nice governed the EU until Lisbon entered into force in December 2009. The Treaty of Lisbon, however, was preceded by the Constitutional Treaty of 2004, which failed in Dutch and French referenda.²⁹ The Constitutional Treaty included the Charter of Fundamental Rights of 2000. The Charter was a restatement of individual rights common to the region that would be enforceable by the ECJ. The Charter of Fundamental Rights did not enter into community law until the Lisbon Treaty.³⁰ The law included in the treaties is known collectively as the Union’s *primary law*.

²⁴ *The Merger Treaty*, 1967 (“Brussels’ Treaty”) Accessed last 2 May 2010 at www.ena.lu

²⁵ *The Single European Act*, 1987 (“SEA”) Accessed last 2 May 2010 at www.ena.lu

²⁶ *Treaty on European Union*, 1993. (“TEU”) Accessed last 2 May 2010 at www.ena.lu

²⁷ *Treaty of Amsterdam amending the Treaty of the European Union, the Treaties establishing the European Communities and certain related acts*, 1999. (“Amsterdam”) Accessed last 2 May 2010 at www.ena.lu

²⁸ *Treaty on the Functioning of the European Union*, 2003. (“TFEU” or “Nice”) Accessed last 2 May 2010 at www.ena.lu

²⁹ For greater analysis on this, see Christiansen, Thomas and Christine Reh, *Constitutionalizing the European Union* (New York, New York: Palgrave Macmillan, 2009) and Eriksen, Erik Oddvar and John Erik Fossum “Europe in Search of Legitimacy: Strategies of Legitimation Assessed” *International Political Science Review / Revue internationale de science politique*, Vol. 25, No. 4 (Oct., 2004), pp. 435-459. Stable URL: <http://www.jstor.org/stable/1601608>

³⁰ *The Charter of Fundamental Freedoms*. 18 December 2000. At: http://www.europarl.europa.eu/charter/pdf/text_en.pdf

Membership in the European Coal and Steel Community included: France, Western Germany, Belgium, Luxembourg, the Netherlands, and Italy. In 1973, the UK, Denmark, and Ireland joined the European Communities. Greece joined the communities in 1981; Spain and Portugal joined in 1986. Greenland, formerly a protectorate of Denmark, left the community in 1985 and is the only state to have done so. After the fall of the Berlin Wall, Eastern Germany joined the communities in 1990. Austria, Finland, and Sweden joined in 1995. On 1 May 2004 ten countries—the Czech Republic, Greek Cyprus, Estonia, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia, and Slovakia—joined the Union, followed in 2007 by Bulgaria and Romania. These two expansions are colloquially referred together as the “Big-Bang” enlargements.³² Today the EU consists of 27 nations.

Iceland, Albania, Montenegro, and Serbia have opened applications to join the EU, and the Former Yugoslavian Republic of Macedonia, Turkey, and Croatia have all been granted Candidate status.³³ A European Union Candidate has been accepted in principle and can accede to the Union once the country incorporates into its national law the Community’s immense set of laws, the *acquis communautaire*. The FYROM and Croatia are expected to accede to the Union by 2013, while Turkey’s accession is contested. Turkey’s Candidate status was granted largely as a concession over the status of Greek Cyprus. Potential candidates—those who could feasibly apply for membership—include the Western Balkan states Bosnia and Herzegovina and Kosovo (internationally recognized by most EU member states, but not by the Union), and the members of the Eastern Partnership. The Eastern Partnership is a project inaugurated in 2009 to improve political and economic relations of the EU with six post-Soviet states: the Ukraine, Belarus,

³² Emerson, Michael, Senem Aydin, Julia De Clerck-Sachsse and Gergana Noutcheva. “Just What is this ‘absorption capacity’ of the European Union?” CEPS Policy brief, No. 113, September 2006

³³ So named because of Greek legal protests over the name “Macedonia”

Moldova, Azerbaijan, Armenia, and Georgia. However, the strength of the Eastern Partnership's potential membership is questionable and likely turns on the status of Turkey.

The last decade's expansion caused member states to express an unwillingness to move on open applications.³⁴ Eurobarometer polls of European citizens also expressed this view.³⁵ This unwillingness is dubbed by commentators as "enlargement fatigue."³⁶

Additionally, the Eurobarometer shows that "euroskepticism" rose in the past decade. This is a general term to describe criticism of the EU that fundamentally opposes the process of European integration. The rhetoric of political parties on the socialist left and nationalist right particularly focus on this criticism.³⁷ These parties have been gaining seats within the European Union's elected organs. Moreover, scholarship and the media frequently study the 'democratic deficit' of the European Union.³⁸

The rise in enlargement fatigue and prevalent euroskepticism are frequently cited as causes for the failure of the Constitutional Treaty in 2004 in two of the founding member states, France and the Netherlands.³⁹ This rejection solidified the general trend over the past decade for the EU: a short, rapid expansion and integration of EU membership followed by generally negative feelings towards a deeper and wider Union. There may be a causal relationship between

³⁴ See for example, Piket, Vincent. "EU Enlargement and Neighbourhood Policy" *Russian Regional Perspectives Journal* Vol 1 Issue 3. Accessed last 17 April 2010 at <http://www.iiss.org/programmes/russia-and-eurasia/copyof-russian-regional-perspectives-journal/rvp-volume-1-issue-3/eu-enlargement-and-and-neighbourhood-policy/>

³⁵ Wyles, John. "The EU suffers from more than enlargement fatigue" *EuropeanVoice.com* 14 May 2005. Accessed last 29 March 2010 at: <http://www.europeanvoice.com/article/imported/the-eu-suffers-from-more-than-enlargement-fatigue/64874.aspx>

³⁶ Christiansen and Reh

³⁷ Who use the term to describe an opposition to a regionalized capitalistic system. See Sørensen, Catharina. "Danish and British popular Euroskepticism compared: A Skeptical Assessment of the concept." (Copenhagen: Danish Institute for International Studies, 2004)

³⁸ Szczerbiak, Aleks and Paul Taggart. *Opposing Europe?: The Comparative Party Politics of Euroscepticism*. Volumes I and II. (Oxford: Oxford University Press, 2000)

³⁹ Christiansen, Thomas and Christine Reh, *Constitutionalizing the European Union* (New York, New York: Palgrave Macmillan, 2009)

the community's expansion and expressed negativity to the community,⁴⁰ but one should be wary of such a simplistic causal chain when examining social actors.

For human rights protection, this trend presented a stumbling block for the integration of the Charter of Fundamental Freedoms into community treaty law. The Charter's incorporation into treaty law was a necessary condition for its full enforceability under the ECJ, and the failure of the Constitutional Treaty reflected poorly on the future of the Charter. Thus, the Charter's re-inclusion in the Lisbon Treaty reflects the historical durability of the consensus European actors constructed during the Charter's creation. This consensus is discussed in detail in Chapter III.

ii. The Operational Structures of the European Union

The European Union is structurally divided into the European Council, the European Commission, the European Parliament, the Council of Ministers, and the European Court of Justice. Over the course of the treaties, these organs maintained their general purposes although their operational procedures and interactions changed.⁴¹ The primary purposes of these organs are to produce and enforce the Union's *secondary legislation*. Secondary legislation is law created by the Union's organs but derived from treaty competences. This is compared to primary legislation, which is the treaty law itself. Under treaty law, a state must incorporate into its national law all secondary legislation that applies to the state.

⁴⁰ Stone Sweet, Alec. *The Judicial Construction of Europe* (New Haven, Connecticut: Yale University Press, 2004) pp. 4-11.

⁴¹ The following sections are derived fairly closely from Nugent, Neil. *The Government and Politics of the European Union* 6th ed. The European Union Series (New York, New York: Palgrave Macmillan, 2006).

The European Council is the organ comprising the heads of state or government of every member state. It meets infrequently⁴² and deals with general principles of the European Union. It has no formal legislative power, and expresses the member states' goals for the Union.

The European Commission is the bureaucracy of the European Union. The Commission begins the legislative process and is the only organ with the authority to originate legislation. The Commission also conducts the Unions' studies, ensures Member State compliance with legislation, and undertakes the payroll, scheduling, and other administrative functions of the Union.

The Council of Ministers (not to be confused with the European Council), now formally named the "Consilium,"⁴³ represent member states' interests in the EU legislature. Every member state has one representative (now at 27) in the Council of Ministers. Formerly the Ministers each had a veto on a wide band of legislation. The Lisbon treaty eventually will revoke this veto in 2014 when it applies more qualified majority voting to the Council of Ministers' voting structure.

Qualified majority voting weights states by population and requires either 50 or 67% of member states who represent at least 62% of the EU's population for a motion to pass. In 2014, the Lisbon Treaty will change the Council of Ministers' veto system by requiring 4 countries or 35% of the represented population vote to block a motion. The Council of Ministers can also unanimously decide to change a voting structure for certain forms of legislation from unanimity to either qualified majority voting or even simple majority voting. This Council of Ministers action is labeled the 'passerelle' procedure.⁴⁴

⁴² At minimum, twice every 6 months

⁴³ A latin word adopted to avoid this confusion

⁴⁴ McCormick, John. *Understanding the European Union*. The European Union Series(New York, New York: Palgrave Macmillan, 2002) p 74

The European Council appoints the Council of Ministers' president and cabinet. Since the Council of Ministers does not have the authority to initiate legislation, it receives bills from the Commission. The Council of Ministers is therefore gradually changing from an organ that represents member states' interests to a more constrained forum that expresses member state opinion. Currently the Council of Ministers still has a great deal of power in stopping the Parliament's legislation, but this power is gradually contracting.

The European Parliament was designed in 1952 as the European residents' representative organ.⁴⁵ Originally its membership ("MEPs") was drawn from member state parliaments. After the treaties of Rome, MEPs are directly elected in European elections. Due to member state dissent in the Council of Ministers, European elections didn't actually occur until the passage of the Merger Treaty. The Parliament now passes legislation on the basis of a simple majority and rejects legislation on the basis of an absolute majority. A simple majority requires only more than 50% of the representatives present at quorum, while absolute majority requires 50% of all elected representatives.⁴⁶

The European Court of Justice is located in Luxembourg and comprises the Court of Justice (from 1952), the Court of First Instance (from 1988), and the Civil Service Tribunal (from 2004). One appointed judge from each member state sits on each court. Each court has a registry in addition to its general chambers, which oversees the administration of the court in areas of finance, translation, document preparation, etc.

The Court of Justice can sit either in chambers of three or five judges or in a Grand Chamber of 13 judges. The Court operates collegiately; decisions are delivered from the Court as

⁴⁵ Originally the Parliament was called the "Common Assembly"

⁴⁶ In an absolute majority vote absence or abstention equates to a no-vote.

a whole and minority opinions are not procedurally allowed.⁴⁷ The ECJ can make directly actionable decisions, or interpretive decisions under a preliminary ruling. The Court can also propose interim measures within these decisions. A direct action is immediately binding on the parties involved and sets a timeline and other requirements for compliance. States, institutions, or individuals can request preliminary rulings of the Court regarding the interpretation of a community law. Decisions on preliminary rulings are binding insofar as their interpretation is followed. The Court's jurisdiction is confined to those areas explicitly made judicable in the primary law of the Community (i.e. the Treaties).

Before the Lisbon treaty, most secondary law under the Maastricht treaty's second pillar (Common Foreign and Security Policy) and all secondary law under the Maastricht treaty's third pillar (Police and Judicial Co-operation in Criminal Matters) was outside the Court's jurisdiction. The Lisbon Treaty consolidates the pillar structure, and all forms of community law are now within the ECJ's jurisdiction.

The three-pillar structure dividing EU activities by subject area was first adopted in the Maastricht Treaty. The different pillars delineated the legislative processes and voting structures of the Parliament and the Council of Ministers. The different pillars could also negate the ECJ's jurisdiction.

The first pillar covered economic, social and environmental policies. In these areas the EU had a great deal of supranational competence and had an international legal personality to negotiate with third parties. The second pillar was the Common Foreign and Security Policy, which dealt with border control, immigration, and foreign policy. The Council of Ministers had

⁴⁷ Europa Curia. *Rules of procedure of the Court of Justice* accessed last 12 April 2010 at http://curia.europa.eu/jcms/upload/docs/application/pdf/2008-09/txt5_2008-09-25_17-33-27_904.pdf

greater power than the Parliament or the Commission in this area, and thus member states ostensibly had a veto in this area. The second pillar severely limited the ECJ's jurisdiction. The third pillar, Police and Judicial Co-operation in Criminal Matters, dealt with Europol, sharing of intelligence, and the cooperation of national judiciaries. Member States had an actual veto over EU policies in this area and the ECJ had no jurisdiction.

Under the Lisbon Treaty, these three pillars are consolidated. The pillars' structure can still be felt as subject areas continue to vary the legislative processes of the Parliament and Council of Ministers. The gradation of EU legislative competence will exist at least until 2014, but it will likely last for the foreseeable future. However, after Lisbon all EU law is judicable under the ECJ. Obviously, there is little case law in those areas formerly under the second and third pillars.

The Lisbon Treaty changed the details of the EU's legislative processes. The Lisbon Treaty rather changes the power dynamics of the Union's organs, but the process remains functionally equivalent. The commission originates and drafts all legislation. Based on the legislation's policy area, it is passed by the Parliament and the Council of Ministers using one of three procedures: the co-decision, assent, or consultation procedure.⁴⁸

The co-decision procedure has complex rules for the Parliament and the Council of Ministers to conduct various readings and amendment procedures,⁴⁹ and results in a final reconciliation process before adoption. The assent procedure requires only the assent of an

⁴⁸ Consilium "Decision-making in the European Union" at http://europa.eu/institutions/decision-making/index_en.htm. Accessed last: 31 March 2010.

⁴⁹ For a flow chart see the Commission's webpage, http://ec.europa.eu/codecision/stepbystep/diagram_en.htm

absolute majority the Parliament before the Council of Ministers can adopt an act.⁵⁰ Finally, the consultation procedure allows the Parliament to approve, reject, or request amendments to the Commission. Under consultation, the Council of Ministers can amend the measure only by unanimous vote but can adopt or reject the measure using the odd voting rules covered above.⁵¹

The co-decision procedure gives the Parliament primary control; the assent procedure gives the Council of Ministers primary control; and the consultation procedure gives the Commission primary control.

The forms of secondary legislation that move through the EU's organs are regulations, directives, decisions, and recommendations/opinions. Regulations are binding for all member states. They deal with policy areas in the EU's sole competence, and must be transposed into national law.⁵² Directives require certain member states to achieve a general goal without dictating the means to achieve it.⁵³ Directives and their timetables are binding on the member states addressed, but transposition into national law is indefinite due to the inherent ambiguity of a directive.⁵⁴ Decisions are binding to those states or individuals to whom it is addressed, and are typically used for proposed mergers.⁵⁵ Recommendations and opinions are non-binding.⁵⁶

The legislative procedure and voting rules of the EU organs for producing regulations, directives, decisions and opinions are graded with the policy area's supranationalization in the

⁵⁰ An absolute majority requires more than 50% of total representatives to pass. Compare this to a simple majority which only requires more than 50% of the representatives present to pass. Thus, under absolute majority, an absence or abstention is effectively a 'no' vote.

⁵¹ See Chapter I pp. 22-23

⁵² Article 288, TEU (formerly 249 of the TEC)

⁵³ Ibid.

⁵⁴ McCormick, John. *Understanding the European Union*. The European Union Series (New York, New York: Palgrave Macmillan, 2002) p. 238

⁵⁵ Craig, Paul and Gráinne de Búrca *EU Law, Text, Cases and Materials* (4th ed. ed.). (Oxford: Oxford University Press. 2007) p. 279

⁵⁶ Article 288, TEU (formerly 249, TEC)

treaties. Before Lisbon, this valuation was organized under the three pillars. Now, legislative rules shall be decided on a case by case basis by the Council of Ministers, but all policy areas can be judicable in the ECJ's jurisdiction.

Additionally, Lisbon has provided the EU an international legal personality in all respects. Member states have therefore given the EU an ability to accede to treaties, make agreements with third parties, apply to certain international courts, and join certain international organizations. In terms of human rights, this implies that the EU as a whole can accede to the Council of Europe and the ECHR. This accession, should it actually occur, would subject community law and action to the ECtHR's jurisdiction.

The European Union is fundamentally a supranational government with limited competences. These competences have expanded at the behest of Member States, who sign treaties and incorporate them into national law. For the European human rights regime, this means that the expansion of the ECJ's jurisdiction into all forms and functions of the EU's secondary laws relates fundamentally to member state behavior. How this member state behavior is constructed is analyzed in Chapter III.

iii. Limitless growth

Over the past century, the European Union has expanded its membership and deepened the integration of member states into the regional structures. This growth appears to have been

exponential after the fall of the Berlin Wall. The rate of these developments has caused some commentators⁵⁷ to argue that the EU may indicate a post-national era in Europe.

However, these commentators may be jumping the gun by declaring the EU as inevitably on a path towards fully regional government. The traction of euroskepticism and the failure of the Constitutional treaty in the past decade imply that member state citizens do not perceive a common European identity as an accurate description of their social identities. Further, euroskepticism may rise in the coming year in Germany, France, and the other founding members in reaction to the economic problems that face Greece, Ireland, Portugal, Spain, and much of the Eastern bloc.

The idea that the European Union has a manifest destiny, or some definite end, should be viewed with skepticism even though post Cold War history can be read to support such a conclusion.

This paper obliquely addresses this skepticism of European growth by studying the convergence of the Union with the European Convention of Human Rights. Focusing on the jurisdictional boundaries of the ECJ and the ECtHR, it examines a narrow area of the Union's growth.

This narrowness allows the paper to ask certain questions, while necessarily limiting it elsewhere. To justify a jurisdictional approach, the next section argues that international courts are proper forums to conduct a regional study. The following section then shows that a constructivist study is a useful approach to study international courts.

⁵⁷ See for example, Schäffner, Christina, Andreas Musolff, and Michael Townson. "Diversity and Unity in European Debates" in *Conceiving of Europe: Diversity in Unity* (Brookfield, Vermont: Dartmouth University Press, 1996); Stone Sweet, Alec. *The Judicial Construction of Europe* (New Haven, Connecticut: Yale University Press, 2004); and Chryssochoou, Dimitris N. *Theorizing European Integration*. (New York, New York: Routledge, 2009)

ii. Why study international courts?

International human rights courts matter for regional studies because they represent one form of regional integration. For Europe, the abuses of individual rights by states during the first half of the 20th century and the inability of weak global political leagues to prevent them affected the focus of state foreign policies. In the second half of the 20th century these policies centered on creating stronger global and regional political, legal, and economic organizations. Domestically, European states pushed to incorporate stronger human rights codes within national law.

Europe's participation in the creation of the UN and the Security Council symbolized Europe's global effort. The Council of Europe symbolized Europe's regional efforts. The European Coal and Steel Community represented the regional organization of economies. Bi- and multi-lateral treaties on the prevention of human rights abuses and the reconstitution of nations such as Germany around a strong human rights code represented the internal efforts of European states to prevent human rights abuses.

These efforts were all fundamentally based on legal measures. Their treaties were legislative and often imposed on states written obligations to act in certain ways. These treaty laws were enforceable by international courts, socio-political processes, or a combination of both. These enforcement methods' continuing efficacies depend on whether the process is used, and how actors react to the process.

Actors use international courts because actors can promote their interest structures without the use of force in international courts' neutral forums. Studies of individual judge behavior and individual and institutional behavior in international courts' jurisdictions prove that international courts can indeed be geopolitically neutral.

Since courts necessarily assume that individual judges can act impartially, partiality might emerge from a comparison of a judge's actions in cases involving their home state to the judge's actions in cases involving other states. Erik Voeten studies the international judges of the ECtHR, to explore this possibility.⁵⁸ Voeten coded 7,319 judgments published between 1960 and 2006 by issue, characteristics of the judge(s), the resulting judgment, and the judges' relationships to the accused government, and then ran correlation analyses to find relationships. Voeten doesn't find evidence to suggest judges to act in a systematically geopolitical fashion. Rather, he offers evidence that judges can ostensibly be impartial in international courts. Thus, legitimate international courts can be neutral forums for international actors' interactions. International courts therefore *can* legitimately be engaged, but are they?

Every year, individuals apply more frequently to both the ECtHR⁵⁹ and the ECJ than the last.⁶⁰ The ECtHR, between 1955 and 1998 had around 45,000 applications total. In 2007 alone, the ECtHR had almost 49,900 new applications.⁶¹ The ECJ had 445 new applications in 1997,⁶² compared to 1,807 applications in 2008.⁶³

Individuals consistently engage their governments in the court, but do governments react to individual complaints in the court? Indeed, they do.

⁵⁸ Voeten, Eric. "The Impartiality of International Judges: Evidence from the European Court of Human Rights" in *American Political Science Review* Vol. 102, No. 4 (November 2008)

⁵⁹ Registry of the European Court of Human Rights. *European Court of Human Rights Survey of Activities 1959-1998, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, and 2007* (Strasbourg: 2000-2008) accessed last 11 April 2010 at

<http://www.echr.coe.int/ECHR/EN/Header/Reports+and+Statistics/Reports/Annual+surveys+of+activity/>

⁶⁰ Registry of the European Court of Justice. *Annual Report of the Court of Justice (1997-2008)*. (Luxembourg: 1998-2009) accessed last 11 April 2010 at http://curia.europa.eu/jcms/jcms/Jo2_7015/

⁶¹ See note 4, 2007. P. 3

⁶² Registry of the European Court of Justice. *Statistical information of the Court of Justice (1997)*. (Luxembourg: 1998) p. 3

⁶³ *Ibid.* 2008, p. 81, 100-101

Member states have, at the same time, increasingly appealed the ECJ's decisions and increasingly referred individual's cases to its jurisdiction.⁶⁴ When the ECtHR communicates an application to a respondent government, the government almost always engages the cases—3,552 of the 4,416 applications relayed to governments last year were argued within some chamber of the court.⁶⁵ Double counting is likely in these statistics, as the ECtHR's registry compiles statistics individually for each chamber, who can hear the same cases. These statistics do generally show that states engaged the court in around 1,000 cases per year and often followed cases to their conclusions. However, as over 8,000 cases are still at pre-judicial stages (i.e. fact-finding or have been settled outside of the Court), states may engage more cases than are counted.

However one looks at it, states engage individual challenges within the ECJ and the ECtHR, and provide counter claims to appeal negative decisions where they can.

Furthermore, states engage each other in the European courts. The ECJ is more frequently used by states than the ECtHR. Between 1961 and 2008, states applied to the ECJ for 6,318 preliminary rulings, 8,340 direct actions, and 994 appeals in cases regarding other states. Application rates per year to the ECJ have increased in frequency. In 2008, Georgia brought an application against Russia in the ECtHR over the conflict in South Ossetia; this was the first interstate application since the Cyprus conflict garnered four from Turkey against Greece in the early 1990's. There have been a total of 13 interstate applications in the ECtHR.⁶⁶ This tells us

⁶⁴ See note 5, 2008, p 101, 102-103, 104-106

⁶⁵ Registry of the European Court of Human Rights. *Annual Report 2008* (Strasbourg: 2009)P 135 accessed last 11 April 2010 at http://www.echr.coe.int/NR/rdonlyres/D5B2847D-640D-4A09-A70A-7A1BE66563BB/0/ANNUAL_REPORT_2008.pdf

⁶⁶ Lemmens, P and Wouter Vandenhole *Protocol no 14 and the reform of the European Court of Human Rights*. (Antwerp: Intersentia, 2005) p. 72

that states are more likely to interact within the ECJ than in the ECtHR. It also shows that states only apply to the ECtHR in times of forceful conflict between two states.

The take-away is that states and individuals both use and react constructively to the courts. States do not unilaterally undermine the ECJ or the ECtHR's authority like the US has undermined the ICC. Therefore, international courts are a valid case study because they can affect actor interaction and apparently hold enough legitimacy in the eyes of actors to be actually utilized. However, demonstrating that international courts can be studied does not define how to study them. The following section does this by justifying the usage of Constructivist tools in this study.

iii. Why use constructivism?

Methodology choices necessarily open some doors while closing others. This section justifies this paper's usage of constructivism. It first describes the theory generally, as put forth by Alexander Wendt and Ian Hurd. It then relates constructivism to international courts.

Constructivism is the study of how actors understand the world around them. It approaches actors' internal identity- and interest-formation processes as inter-subjective and avoids exogenously given interest structures.⁶⁷ It employs sociological tools to examine how actors express these identities and interests.

Actors form their identities and interests by relating internal experience to external reality. In the process of this interaction, actors perceive and organize experience into a referential catalog of symbols and concepts, which are labeled using communicative language. When an actor communicates with another actor, they both add new experience to their available

⁶⁷ Externally constructed, imported

organization and can alter their set of internal definitions. Thus, a symbol's meaning is internally constructed by an actor as it relates to and interacts with external actions or actors.

This inter-subjective identity-formation potentially brings up problems of perception, language, and expression. Actor interaction is a complex socializing process as actors can perceive differently, use language differently, and express meaning differently. As they interact, actors learn and adjust meaning. This creates a series of feedback loops where an actor is processing information about the external world's perception, language and expression as it receives more information. To understand how actors engage a constantly shifting reality and construct meaning, identities, and interests out of it, one needs to track objects that reflect these shifting internal conceptualizations of external reality.

Ian Hurd examines an actor's identity formation processes by tracking the context and logical premises of an actor's coercive symbol usage. Assuming that actors rationally pursue their interests, Hurd relates what the actor conceives a symbol to mean to how the actor used the concept to coerce others during their interactions. Since the symbols' coercive usage was ostensibly caused by a rational pursuit of endogenously identified positive outcomes,⁶⁸ Hurd can deduce the actors' logical premises. Having identified an actor's conceptualization of the symbol and the context it perceived, Hurd can potentially reconstruct a small aspect of the actor's internal identity- and interest-formation at a given moment. This identification then can lead to predicting behavior in more nuanced ways than formerly possible. However, it is also limited in what it can predict.

Constructivism relates actors within a relatively short time span. This allows for and requires a simultaneous analysis of multiple actors within a limited time-frame. The theory is therefore limited in its ability to extrapolate into a new context without additional information —

⁶⁸Values that are internally constructed, and ranked in preference.

as by then the symbols, actors, and situation have changed. However, since it describes general processes, outcomes from a constructivist study can inform the study of a new situation by providing actors' general interest- and identity-formation processes. Like an algorithm, if the identification of these processes is accurate, it can provide accurate predictions relatively quickly. Or, for an outside observer to understand an area's internal processes.

For example, assume that a study of actor interaction at the 2009 United Nations Climate Change Summit ("COP 15") identifies that German leaders understood environmental problems at that time and place in terms of a populism aimed at future generations. By adding in information about the German reaction to the process and outcome of COP 15, one can predict the general argument that a German leader will make in UN environmental discussions. While this may seem to be an obvious conclusion that any perceptive individual could glean from experience, the power of constructivism lies in its ability to be applied to areas outside of an analyst's immediate experience.

In relation to international courts, constructivism can help observers understand how various actors construct identities in relation to the regional human rights regime. Courts are rife with socially constructed symbols. The rule of law— the foundation for any court— is a constructed symbol often wielded by actors to coerce others. Individuals constrain their behavior according to both procedural and social decorum rules while in court. The media uses the cities of the courts' seats as synecdoche for the institutions and the human rights regime as a whole. The courts streamline their own jurisprudence by developing and using doctrines, principles, and tests.

International courts have symbols which are used by actors who endogenously construct identities and interests. Therefore, constructivism can bear analytical fruit, provided that the aims and predictions are narrowly constructed.

Diagram 5 (next page) outlines the conceptual structure of the European human rights regime and labels the interactions that this paper studies using a constructivist method.

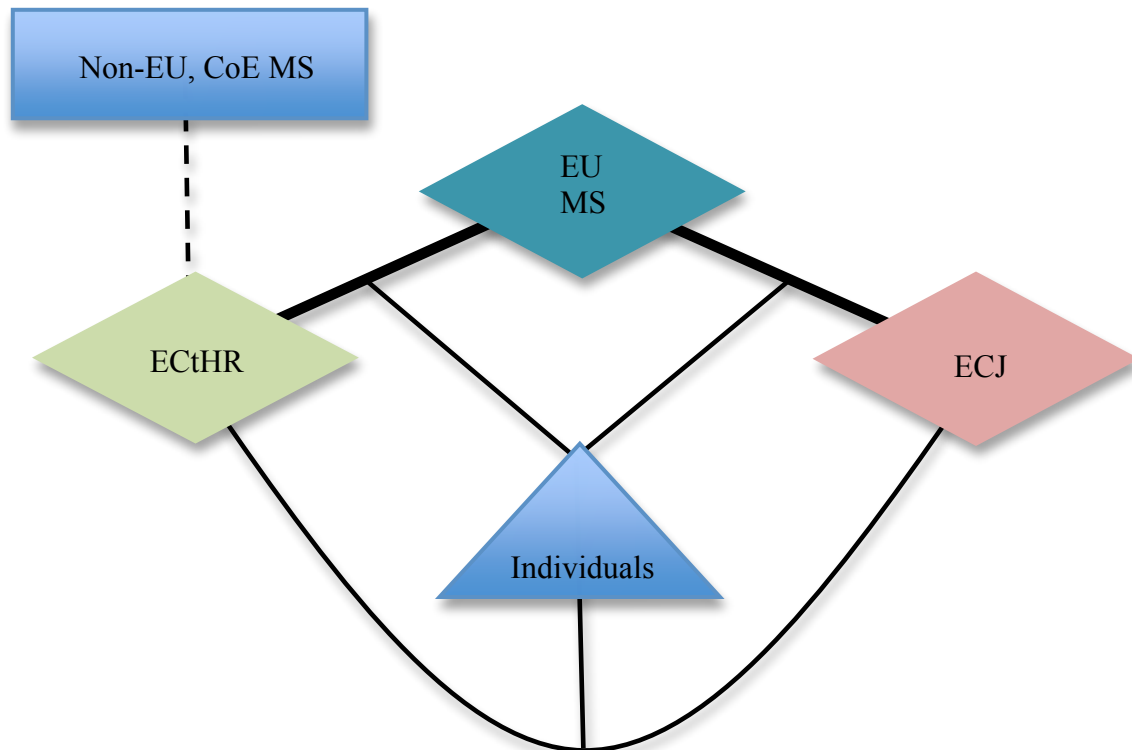


Diagram 5. The simplified network of the European human rights regime

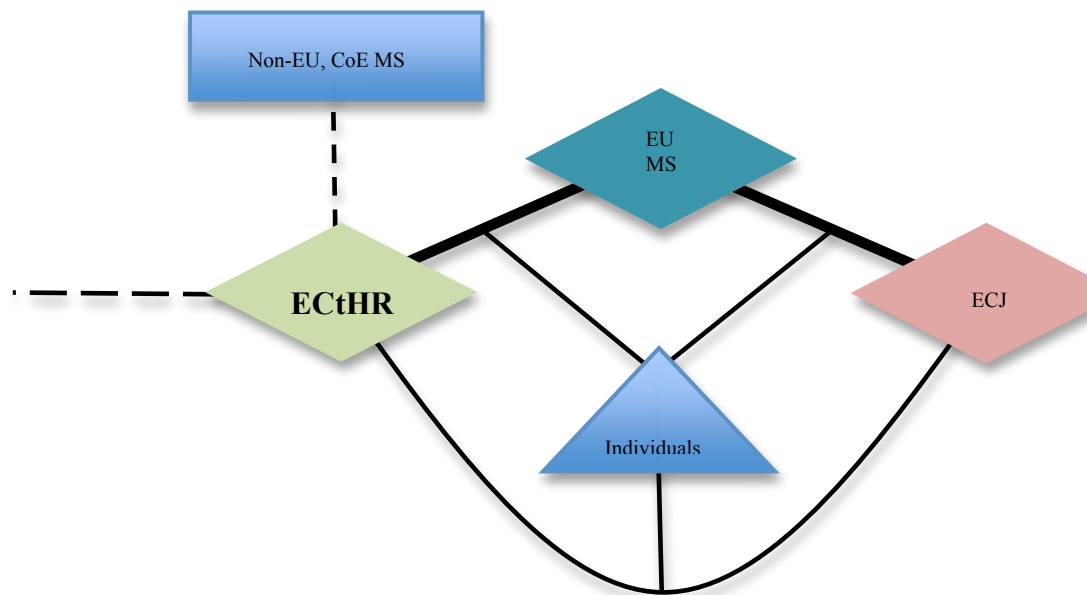
This paper focuses primarily on analyzing the interactions between EU member states and each court. The process of studying these interactions requires and allows a description of how individuals interact with states through the courts. This method also allows an examination of how the courts interact with each other. Since the context of the actors is essential to understanding the actors' interest-formation processes, frequent note will be made to external structures and concerns each actor simultaneously faces. The inclusion in the diagram of non-

European Union members of the Council of Europe is one such example of a fundamental secondary actor relevant to the European human rights regime.

This paper studies the left side of the diagram, and then the right. It examines the ECtHR's network of relationships first, and then looks at the ECJ's network of relationships. Individuals and member states are constants in the analysis, while the other court is viewed as a constant standing in the margins.

This chapter has outlined the institutions of the Council of Europe and the European Union and justified the usage of international courts and constructivism for understanding regional political structures. Chapter II examines the creation and functioning of the ECtHR during the deliberations of the Council of Europe and through its jurisprudence. Chapter III examines the functioning and reconstitution of the ECJ through its jurisprudence and around the intergovernmental convention that created the Charter of Fundamental Rights. Chapter IV concludes this paper by relating the ECJ's and the ECtHR's internally and externally constructed identities to each other and developing a prediction for the future of the European human rights regime.

Chapter II. The European Court of Human Rights



The European Court of Human Rights (“ECtHR”) is the judicial arm of the European Convention on Human Rights and Fundamental Freedoms (“ECHR”). The Court oversees and adjudicates the protection of individual human rights within the member-states of the Council of Europe. The Court is primarily an intergovernmental organization but exhibits some supranational characteristics.

The Court’s authority comes from an intergovernmental convention that relies on member state adherence. Its enforcement apparatus is only the social threat⁶⁹ of expulsion or suspension from the Council of Europe.⁷⁰ However, the court’s internal processes are reminiscent

⁶⁹ Though, one can possibly argue that the expulsion or suspension by the Council of Europe leads to MS policy support of the Court’s decision and thus individual Member states act as part of its enforcement apparatus. I think this argument is a different side of the same coin.

⁷⁰ Greece withdrew before being expelled in the late sixties during their domestic civil war. Turkey was suspended in the early eighties for a military coup, and Russia was suspended at the turn of the millennium for their Chechnya policies. Valls, Raquel. “Withdrawal, expulsion and suspension of a member state of the Council of Europe” (Sanem, Luxembourg: Centre Virtuel de la Connaissance sur l’Europe) viewed in European Navigator, www.ena.lu, on January 13, 2010.

of a supranational court; the Court acts independently of its member states,⁷¹ and its internal leadership is elected internally.⁷²

The Court began operating in the early sixties and still runs today, though in altered form. Post-World-War II theories of international cooperation defined the ECHR's creation; its protected rights come from the UN Universal Declaration on Human Rights and Fundamental Freedoms of 1949.

This chapter examines the European Court on Human Right and its jurisdiction in the European human rights regime in relation to individuals and states. By beginning with the history of the Court's post-war founding, this chapter first establishes what the court *is*. Second, the chapter relates what the Court *does* by analyzing its case law when the court interacts with member states over jurisdictional challenges. This chapter then establishes how the court acts within European politics and relates what the Court *is* to what it *does*. The chapter concludes that the ECtHR is an intergovernmental court that gradually expands its authority but is fundamentally constrained by intergovernmental language.

i. What it is: the Court's constitutive *telos*

The European Court of Human Rights ("ECtHR") oversaw the protection of individual human rights within the member states of the Council of Europe in conjunction with a European Commission on Human Rights until Protocol 11 passed in 1998. The European Convention on Human Rights and Fundamental Freedoms ("ECHR") and the European Court of Human Rights

⁷¹ ECHR § II Arts 32-51, particularly Articles 44 and 46. See also Voeten, Eric. "The Impartiality of International Judges: Evidence from the European Court of Human Rights" in *American Political Science Review* Vol. 102, No. 4 (November 2008) for an examination of whether international judges can legitimately be impartial through an inherent-biases analysis of ECtHR dissents.

⁷² ECHR §II Art. 22

(“ECtHR”) came into existence in 1950 after the creation of the Council of Europe (“CoE”) at the Hague Congress.⁷³

Member states at the 1948 Congress of Europe in The Hague perceived that a convention on human rights constituted a fundamental part of the Congress’ *telos*. The resolution that came out of the 1948 Hague Congress stated, “...the resultant Union or Federation [of this conference] should be open to all European nations democratically governed and which undertake to respect a Charter of Human Rights... [and] a Commission should be set up to undertake immediately the double task of drafting such a Charter and of laying down standards...”⁷⁴

The Hague Congress was attended by over a thousand individuals: 750 official delegates from European national governments, *ex officio* parliamentary members from minority parties, and observers from Canada and the United States.⁷⁵ The leaders, and main speakers, of the Congress were: Winston Churchill, Pierre-Henri Teitgen, Sir David Maxwell-Fife, Harold Macmillan, Konrad Adenauer, Paul van Zeeland, Albert Coppé, and Altiero Spinelli.⁷⁶ The Hague Congress, therefore, represented the majority will of Western Europe to establish a regional structure to protect human rights. However, this was complicated by the dual role these actors played in the UN where simultaneously discussion over the UDHR was occurring.

To understand how the regional debate affected the creation and the constitution of the ECtHR, one must begin at the beginning. The first subsection examines the preparatory work for the convention’s deliberations including the actors who motivated the convention, the source material they used in the convention process, and the symbols they used. The second subsection

⁷³ *Congress of Europe, May 1948* Council of Europe 1999

⁷⁴ Council of Europe “Political Resolution of the Hague Congress (7-10 May 1948)” *Congress of Europe: The Hague- May, 1948*. (London-Paris: International Committee of the Movements for European Unity, 1948) pp. 5-7. Viewed at http://www.ena.lu/political_resolution_hague_congress_710_1948-2-12226 on 13 January 2010

⁷⁵ *Congress of Europe, May 1948* Council of Europe 1999

⁷⁶ *Ibid.*

examines the proceedings themselves. It explores how member states interacted with one another using symbols within the debate structure.

The third subsection draws conclusions from the first two to argue that the ECtHR is an intergovernmental court intended to protect the lowest common denominator of rights across the Council of Europe's member states. It also argues that this constitution was fundamentally motivated by the conflict between the UN's global identity and the European regional identity over the proper enforcement mechanism for the protection of individual rights.

A. Preparatory Work

The preparatory work of the Council of Europe began long before participants started to organize the deliberations, as delegates were socialized prior to the Council meetings. To understand their relationships prior to the deliberations, one ought to outline their general interests. This subsection first outlines the actors who participated in the Council of Europe's deliberations and their social relationships. It then describes the source material that the convention used and with which most participants were mostly familiar. It finally surveys the symbols that they used to interact, communicate, and coerce one another.

i. The Actors

The actors involved in the deliberations were all somehow connected to the European Movement.⁷⁷ The European Movement was the post-war, pan-European party for general

⁷⁷ Zurchee, Arnold J. *The Struggle to Unite Europe: 1940-1958*. (New York, New York: New York University Press, 1958), pp. 30-33; 40-43

European unity.⁷⁸ The movement wrote the first draft Convention and therefore set the initial rhetorical structure for the debate to follow.⁷⁹ While this does not imply that the language of the European Movements' draft was immutable, it does show that the European Movement preconditioned member state delegates to its rhetoric before the debate. The Movement collectively lined the playing field in which delegates would debate.

The Movement's stated purpose in the late 1940's was to structurally unite Europe and rebuild its economy. It consisted of over 1,000 members⁸⁰ from Western European legislatures and executives. These members formed a loose association which espoused general principles and met infrequently.⁸¹ Its leadership came from a British and French coalition: Sir Winston Churchill, David Maxwell-Fyfe, Jean Monnet, Georges Bidault, Henri Teitgen, Paul Ramadier, Robert Schuman and Leon Blum.⁸²

The Movement, as an organization of national leadership, was a loosely collected political party that espoused regional integration and that constructed national leaders' social norms. Its rhetoric valued structural solutions to achieve regional peace based on democratic, intergovernmental unification. Further, its rhetoric focused on unification without the influence of either a foreign Empire (the USSR or the US) or of a single political party (Communists, Socialists).

Most individual member state delegations to the Convention deliberations had also participated in the deliberations in the United Nations General Assembly over the Universal

⁷⁸ Zurchee, Arnold J. *The Struggle to Unite Europe: 1940-1958*. (New York, New York: New York University Press, 1958)

⁷⁹ It exists today as a 'non-governmental pressure-group' (i.e. a lobbyist organization). See The European Movement. "The Objectives of the European Movement" at: <http://www.europeanmovement.eu/index.php?id=6781> Accessed last 13 January 2010.

⁸⁰ Mowbray, Alastair. *Cases and Materials on the European Convention on Human Rights*. Second Edition (Oxford, England: Oxford University Press, 2007).

⁸¹ Ibid.

⁸² Zurchee. at 20-23

Declaration of Human Rights the year before. Many high-level delegates operated in both arenas, but their full staffs are unlikely to have travelled with them. The Italian and Irish delegates to the Council of Europe, however, had not been present at the UN's discussions since the Irish and Italian governments had not joined the UN.⁸³

Pierre Henri-Teitgen and Sir David Maxwell-Fyfe were the main drafters of the Convention.⁸⁴ They were the lead French and British delegates to the process as well. They were also both trained as lawyers. Pierre Teitgen was a politician and professor from Brittany associated with DeGaulle. Sir David Maxwell-Fyfe was a conservative politician, prosecutor, and judge from Scotland. Teitgen went on to help in the creation of the European Coal and Steel Community, and Maxwell-Fyfe became a prosecutor at the Nuremburg trials. Thus, the leaders of the Council of Europe that created the ECHR were prominent British and French lawyers.

ii. *Source material*

The 1948 UDHR was the primary source for the European Movement's draft convention.⁸⁵ The draft included 16 of the UDHR's 30 Articles. Twenty-three were eventually restated in the Final Convention's⁸⁶ seventeen substantive (i.e. non bureaucracy building) portions in substantially the same language.⁸⁷

⁸³ *Collected Edition of the "Travaux Préparatoires"* Vol. I./VII (The Hague, Netherlands: Martinus, Nijhoff; 1975) ("Collected Edition") pp 2-18

⁸⁴ *Collected Edition* Vol. I. pp 92-96. They also conducted questionnaires during the treaty-making process to determine general opinion of the state representatives on certain aspects of the treaty varying from the list of rights to be protected to whether a certain word should be included.

⁸⁵ *Draft Convention for the Protection of Human Rights and Fundamental Freedoms* in *Collected Edition of the "Travaux Préparatoires"* Vol. 1 (The Hague, Netherlands: Martinus, Nijhoff; 1975) Appendix 1 pp. 285-295.

⁸⁶ *Convention for the Protection of Human Rights and Fundamental Freedoms*. In Mowbray, Alastair. Appendix 1, pp 1013-1023; Protocol 1 pp. 1023-1024; Protocol 4 pp. 1025-1026; Protocol 6 pp. 1026-1027; Protocol 7 pp. 1028-1030; Protocol 12 pp. 1030-1031; Protocol 13 pp. 1032-1033; Protocol 14 pp. 1033-1038.

⁸⁷ For a table that details this analysis see Appendix A.

The main features of the UDHR are a list of positive rights for individuals and negative obligations for the state.⁸⁸ This list can be generally classified under eight headings: basic individual rights,⁸⁹ family rights,⁹⁰ socio-economic rights,⁹¹ political rights,⁹² judicial rights,⁹³ cultural rights,⁹⁴ educational rights,⁹⁵ and social structural rights.⁹⁶ UDHR Article 29's social structural rights include limitations for the sake of social welfare and general principles of law.⁹⁷

The UDHR included an avenue to defer to states within its substance. But the UDHR's main deference to state sovereignty is its form. The Declaration is a non-binding statement, not a treaty. The UDHR has only recently been recognized as part of customary international law. As a source it holds with strong moral legitimacy⁹⁸ but no direct enforceability.⁹⁹

The European Movement drew up a Draft Convention that was much more limited in scope than the UDHR, although drawing from its provisions. Of the UDHR's eight general headings the draft convention included only four: individual rights, family rights, judicial rights, and social structural rights.¹⁰⁰ Most of the UDHR's verbiage was left out; the draft included its

⁸⁸ See Appendix for justification of these titles.

⁸⁹ Articles: 1, 2, 3, 4, 5, 6, 9, 18, 19, 20

⁹⁰ Articles: 12, 16

⁹¹ Articles: 17, 22, 23, 24, 25

⁹² Articles: 13, 14,

⁹³ Articles: 7, 10, 11, 15, 21, 28

⁹⁴ Article: 27

⁹⁵ Article: 26

⁹⁶ Article: 8, 29, 30

⁹⁷ Article 29(2) "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."

⁹⁸ Though challenges are made to its universal legitimacy by Islamic states practicing Shar'iah law, who claim the Declaration is a "secular expression of the Judeo-Christian tradition". See Littman, David. "Universal Human Rights and Human Rights in Islam". *Midstream*, February/March 1999 at <http://web.archive.org/web/20060501234759>. Accessed 6 February 2010.

⁹⁹ Dunoff, Jeffery L., Steven R. Ratner, and David Wippman. *International Law: Norms Actors, Process: A Problem-oriented Approach*. (New York, NY: Aspen Publishers, 2006) p. 78-87

¹⁰⁰ See Appendix A

rights in a single article with 11 brief sub-articles. However, the text cross-references its source in the UDHR.¹⁰¹

According to observers, the reliance on the UDHR was meant “to co-ordinate the activity of the Council of Europe with that of the United Nations, as by reason of the moral authority and technical value of the [UDHR].”¹⁰² The intention to create an enforceable document from the provisions of the nonbinding declaration was therefore inherent in the draft convention’s structure.

At the time that the Council of Europe was wrestling with regional human rights protection, the UN¹⁰³ was itself figuring out the full extent of its human rights regime. The debate in the UN Commission on Human Rights¹⁰⁴ had stalled over the last two years. On 26 April 1950 the Commission finally passed a resolution which terminated debate over how to enforce the Universal Declaration.¹⁰⁵

This parallel debate on the global level directly influenced the regional debate in Europe. The ambiguity of the global debate complicated how states approached the Council of Europe and a convention that relies on the UDHR.

iii. The symbols

During the deliberations, actors addressed one another using symbols of organizational relationships, normative values, and legitimacy. They primarily discussed three fundamental

¹⁰¹ See *Collected Edition* Vol I. p. 194

¹⁰² Ibid., also more generally at p. 44-46, 94-6, and 156-8

¹⁰³ Housed then in Lake Success, New York *Collected Edition* Vol. IV pp. 84-100

¹⁰⁴ Established in 1946; Office of the United Nations High Commissioner for Human Rights. At <http://www2.ohchr.org/english/bodies/chr/index.htm>, accessed 16 February 2010

¹⁰⁵ Anonymous. “World Criminal Court Idea Bobs Up Again” *The Chicago Daily Tribune*. 16 April 1950; Anonymous, “The Proceedings In the UN” *The New York Times*. 26 April 1950. Accessed last 29 March 2010 at: <http://select.nytimes.com/gst/abstract.html?res=F20A16F7345D147B93C4AB178FD85F448585F9>.

questions facing the deliberative bodies. First, what is the relationship between the Council of Europe and the UN, or, what should be the relationship of the ECHR to the UDHR? Second, what rights are fundamental and how are they defined? Third, what mechanism best protects fundamental individual rights?

When actors addressed the question of the Council's relationship to the UN, they used arguments that identified the Council either as subordinate to or equal with the UN as a whole. Thus, actors stressed either a monist or a dualist system of political organization between the regional and global organizations.

When actors addressed the question of substantial rights,¹⁰⁶ they utilized two symbolic axes—the substance and extent of rights.

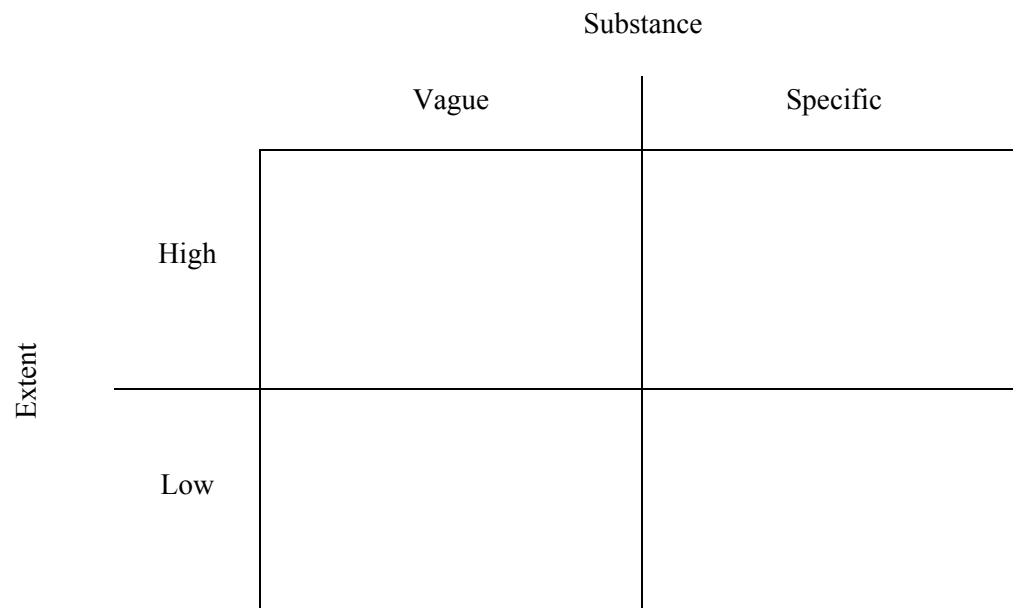
To communicate about the substance of rights, actors used concepts of a wide or narrow spectrum of rights. In doing so, they argued for the Council to take a certain position on the axis or identified a set of rights neglected in the axis.

To communicate about the extent of rights that can be protected, actors used an axis based on the level of enumeration in a right. Actors argued for the Council to either define provisions specifically or broadly. They typically did so to either narrow or broaden the interpretative horizons of the provision.

Thus, actors dealt with the substance of human rights by employing a dual axes organization based on the number of rights to include, and how to include them.

¹⁰⁶ i.e. what individual rights are fundamental and to what extent they can be feasibly protected

Diagram 7. The Axes of ECHR Human Rights Provisions



When actors addressed the enforcement question, they used either the idea of a court, a commission, or their relationship to communicate. For example, when Britain argued that a court might not be a feasible mechanism to garner wide member state support, its delegates communicated their belief that a court with primary jurisdiction over its member states is not normatively valuable. The flip side of the coin is that by negating the normative value of the Court, the British promoted the value of the commission alone, provided that the British found any value in the discussion at all.¹⁰⁷ Thus, the court and the commission are symbols wielded by actors.

Therefore, actors use language of hierarchy to discuss the relationship of the Council of Europe and the Convention to the UN and the UDHR, a description of axes to communicate

¹⁰⁷ It can be assumed that any actor present thinks the deliberations have some value.

about rights' substance, and the concepts of a court and a commission to debate the enforcement mechanism for the convention.

These symbols were wielded by actors during the deliberations to coerce others' belief structures and to their internal interest-formation processes. The next section analyzes these deliberations in light of the actors' personalities, their source material, and the symbols they used to understand and influence one another.

B. The deliberations

The deliberations of the Council of Europe's Consultative Assembly, the Committee of Ministers, the Assembly's Subcommittee on Legal and Administrative Questions, and the Minister's Committee of Legal Experts were marked by a focus on conflict. Member state delegates didn't discuss areas of consensus, but vociferously addressed sticky questions of the relationship of the region to the UN, the scope of protectable individual rights, and the enforcement mechanism of a regional convention.

Symbols were used, debated and defined in the process. Until the actions of the UN caused a collective reaction within the Council, internal conflicts over the identity of normative value threatened to break the Council's processes apart. This collective reaction coalesced member state opinion around pre-existing consensus that the delegates had taken for granted and motivated the Council to solve its internal conflicts.

i. The convention debate structure

The Convention was built under Statute of the Council of Europe's treaty-making procedures within the Consultative Assembly and the Committees of Ministers and their subcommittees.¹⁰⁸ The Consultative Assembly's subcommittee was the Committee on Legal and Administrative Questions, comprised of 20 Assembly representatives from each state and chaired by Maxwell-Fyfe and Teitgen.¹⁰⁹ The Committee of Ministers subcommittee was Committee of Experts on Human Rights, comprised of by professors and ministers from Belgium, Denmark, France, Greece, Ireland, Italy, Luxemburg, Norway, Sweden, Turkey, the United Kingdom, and the Netherlands and chaired by Mr. E. de la Vallee-Poussin of Belgium.¹¹⁰ The deliberations occurred in Paris and Strasbourg, where the Committee of Ministers and the Consultative Assembly met, respectively. The deliberations lasted from early 1949 until 4 November 1950. The discussion operated in English and French; non-native speakers brought translators. However, a few non-French-speaking delegates complained that they were prevented from engaging fully by the amount of French spoken.¹¹¹

Unlike the San Francisco Conference, larger states heard and respected smaller state opinion during the Council of Europe deliberations. Small states with delegates in the Committee of Legal affairs and the Committee of Experts were particularly influential in the process. Nonetheless, the architects of the Convention— Teitgen and Maxwell-Fyfe— individually had more control over the convention's details, as points of confusion were directed to them. But, on a structural level, the final Court remained similar in form to the Legal Affairs Committee's proposed structure, where small state delegates had a significant voice.

¹⁰⁸ *Statute of the Council of Europe*, at <http://conventions.coe.int/Treaty/en/Treaties/HTML/001.htm>. Accessed 10 January 2010.

¹⁰⁹ *Collected Editions*. Vol. I. pp 162-164

¹¹⁰ *Ibid.* Vol. III. p. 252

¹¹¹ *Collected Edition* Vol. II. p. 22

ii. *Deliberative conflict*

These deliberations of the Council of Europe over the ECHR progressed through four stages of conflict.

The first stage was the conflict between the Consultative Assembly and the Committee of Ministers over the Agenda for the Council of Europe. The two bodies disagreed over whether the Council of Europe should discuss human rights at the same time as the UN. The second stage of conflict was within the Consultative Assembly over the Convention's substance. The Assembly fundamentally disagreed about the included rights' scope and level of enumeration.¹¹² This conflict culminated in the Committee of Ministers apparently rejecting the Assembly's draft by referring it to a Committee of Experts. The third and final stage of conflict was within this Committee of Experts over the Convention's political purpose vis à vis the global human rights regime of the UN. This final conflict concluded when the Council reacted to the inaction of the UN's human rights regime.

European regional opinion coalesced around the UN's inability to produce an effective enforcement mechanism for the UDHR. A consensus formed among the member states' delegates that a regional court structure with the ability to evolve holds normative value. Thus, the ECtHR was created by actor's internal perception of a conflict between the region's and globe's values.

Three questions dominated the delegates' deliberations. The first major question was to define the relationship between the Council of Europe's human rights framework and that of the

¹¹² The scope of rights means delimiting how far a right is protected, what limitations are available to states, and who is protected by a set of rights. The level of enumeration is whether this scope is written out, or if a right is left general to allow for future definition.

UN. The Committee of Ministers differed with the Consultative Assembly over this during the agenda-setting processes. Delegates within the Consultative Assembly disagreed with each other. The question reiterated in each organ until the UN Human Rights Commission was formally laid out without legally binding provisions in Lake Success, New York.¹¹³

The second question was how specifically the European Convention on Human Rights should enumerate protected rights. Greater levels of enumeration constrain the ability of judges to interpret law into new cases while providing a clear meaning. This issue was raised in the Committee of Ministers' discussion over the agenda,¹¹⁴ but arose more specifically and divisively in the meetings of the Committee of Legal Experts.¹¹⁵

The third question was whether to enforce a collective guarantee for the protection of human rights, and how to do so: through a commission of human rights like the UN's, by a new Court, or some third option. This discussion was formally raised in the agenda setting stages, but wasn't finally decided until the UN's inaction influenced regional opinion.

I. The first stage: the agenda

Before the debate formally began there was conflict over it. Since the Committee of Minister controlled the Council of Europe's Consultative Assembly's agenda at that time, conflicting definitions of worthy discussion could spark internal conflict between it and the Consultative Assembly.

The Committee of Ministers' Preparatory Commission drafted an agenda for the Assembly that included the discussion of Human Rights definitions and protection in the Council

¹¹³ *Collected Edition* Vol. IV pp. 84-100

¹¹⁴ *Collected Edition* Vol. I, p 10-12, quote at 10

¹¹⁵ *Collected Edition* Vol. IV pp. 130-138

of Europe.¹¹⁶ When this reached the whole Committee of Ministers—12 members at the time—the Committee decided that the Assembly should not be invited to consider defining human rights since this action was already being settled in the UN.¹¹⁷ This decision was primarily advocated by the French and British delegates and was opposed only by the Danish and Irish delegations.¹¹⁸

The Consultative Assembly protested this decision vehemently. Three proposals with over half of the Assembly's signatures included a human rights convention on the agenda.¹¹⁹ After the Committee of Ministers acquiesced, Churchill went so far as to rebuke the Committee of Ministers, "We attach great importance to this, Mr. President... A European Assembly forbidden to discuss human rights would indeed have been a ludicrous proposition to put to the world."¹²⁰ This sentiment was reiterated less succinctly by a series of speeches made by the rest of the Assembly.¹²¹

For member states' delegations to the Consultative Assembly, the deliberation and passage of a convention on human rights with definitions *in addition to* the UDHR was an important part of the post-war reconciliation processes. The subtext of the Assembly's reaction, and what the members' speeches seem to take for granted, was a belief that the regional-global relationship of the Council of Europe and the UN was not an ascending monist hierarchy but was two overlapping political forums for the discussion of peace-maintenance in international

¹¹⁶ See *Collected Edition* Vol. I, p 2-6

¹¹⁷ Ibid, p 12

¹¹⁸ Ibid p 10-12

¹¹⁹ Ibid. p 14-16

¹²⁰ Ibid. p. 34

¹²¹ Ibid. pp 20-36

affairs.¹²² Furthermore, the Council of Europe's legitimacy as a regional political organization depended for many members on how it dealt with the issue of human rights.¹²³

The Committee of Ministers acquiesced on 13 August 1949 stating that the Universal Declaration lacked precision and probably could be refined. It also stated that it didn't want to appear as if it were criticizing the Assembly.¹²⁴ The Committee of Ministers did not, however, deny their original concerns about a dualist Council and Convention.¹²⁵ Thus, while the Consultative Assembly determined that the relationship of the Council of Europe to the UN did not preclude a regional convention on human rights, the members of the Council remained skeptical.

At this stage, most participants were mindful of the UN's actions but believed that its processes were external to the Council of Europe. In their negative reaction to the Committee's arguments, the member states' delegations expressed a belief that the European Convention of Rights could co-exist with the UN's UDHR in whatever form it took. This argument necessarily requires that regional organizations could and would operate parallel to global organizations. At this stage, member states believed that the UN was an external actor whose actions were tangential to the Council's internal decision-making processes.

¹²² See for example, *Collected Editions* Vol I at p. 30 esp. Lord Layton

¹²³ Ibid. p 16-18, e.g. "M. Mollet (France): ... Then it is necessary to give our Assembly and the Council of Europe some moral basis. Right from the outset- on the occasion, for example, of a discussion on the Court of Justice and on human rights- we could lay down the conditions which the countries belonging to what will, in the future, constitute Free Europe, are to apply, at home, the principles which they will by then have agreed to."

¹²⁴ Ibid. p 24, esp. M. Lange (Norway)

¹²⁵ Ibid.

II. The second stage: substance

Once placed on the Consultative Assembly's Agenda, the Convention entered the Statute of the Council of Europe's formal treaty-making processes. The Assembly began amid a plethora of proposals and speeches.¹²⁶ Most proposals and speeches at the outset of the debate focused less on the specifics of the European Movement's draft Convention than on the general principles that underlie it. Sometimes they didn't bother.¹²⁷ Proposals and speeches came from most member states, but the UK, France, Italy, and the Benelux countries were the most vocal.¹²⁸

In the beginning the Assembly learned from the troubles in the UN on creating an enforcement mechanism from a broad collection of rights, and focused on limiting the Convention's rights to only those most commonly held. Therefore delegates agreed to summarize the individual rights existent in member state law rather than aspire to enforce new individual rights. After the first round of proposals, the Assembly expressed a belief that European member states wouldn't ultimately agree to enforce the scope of rights included in the UDHR.¹²⁹

On 22 August 1949 the Consultative Assembly presented a series of questions to the Committee on Legal and Administrative Questions ("the Legal Affairs Committee").¹³⁰ This Committee discussed the technical aspects the matter over the next two weeks.¹³¹

¹²⁶ *Collected Edition* Vol. II. pp 36-154

¹²⁷ See particularly the row between the British Socialist delegate Mr. Nally and the British Conservative delegate Sir Ronald Ross on pp 144-154, which devolves from a theoretical debate into formal name-calling and personal attacks. This was an exception to the early debate, but is an example of the general philosophic and non-technical nature of the discussion.

¹²⁸ Ibid note 88

¹²⁹ Ibid. p. 44-46, 156, 160-162.

¹³⁰ Ibid. pp 156-162

¹³¹ Ibid pp 162-238

Representatives from each state made, debated, and voted on proposals. Of the 75 substantive motions made,¹³² delegates from France¹³³ and England¹³⁴ accounted for 31. The most active individual proposal-maker was Mr. Rolin of Belgium.¹³⁵ He drafted 20 substantive motions alone or in part.

In their motions, delegates to the Legal Affairs Committee adjusted the draft convention and proposed measures to guarantee individual rights through an intergovernmental court that protects the lowest common denominator of rights, broadly defined.¹³⁶ Thus, the Legal Affairs Committee concluded that a convention that incorporated vague definitions of common rights, enforced by a legal body, held the greatest normative value for the Council, its member states, and its individual citizens.¹³⁷

The Legal Affairs Committee also proposed that the Court be both complementary to national courts and subordinate to the international justice system. In paragraph 23 of its proposal, the Legal Affairs Committee placed the court under the jurisdiction of the UN's International Court of Justice.¹³⁸ Individual complaints would not be adjudicated internationally until all national jurisdictions were exhausted.¹³⁹

The annex to the Legal Affairs Committee's Report first included relevant provisions of the UDHR and secondly explained each proposal's rationale. The Legal Affairs Committee used the proper location of protected rights along dual axes and the idea of a Court as its argument's symbols. By using these symbols, the Legal Affairs Committee preconditioned states to the axes

¹³² *Collected Edition* Vol II. pp .170-214

¹³³ *Ibid* p 170;esp. MM Teitgen and Bastid

¹³⁴ *Ibid*; esp. MM Ungoed-Thomas and Layton

¹³⁵ *Ibid*.

¹³⁶ *Ibid*.. pp 164-214

¹³⁷ *Ibid*. p 216

¹³⁸ *Ibid*. p 226. "Anxious, however, not to set itself up in opposition either to European legal order and general international order... States concerned might also... refer a matter to the Court of International Justice."

¹³⁹ *Ibid*. "The Commission shall not deal with an individual complaint until after the plaintiff has exhausted 'all other means of redress within a State'."

of rights, and invoked well-known symbols to inform the Assembly's redrafting. The Legal Affairs Committee used these tools to argue that the best enforcement mechanism for individual rights would be a court with a limited jurisdiction. This expressed the Legal Committee member's perception that a court would be more valuable than a commission, but a supranational court would not be acceptable to the sovereign member states. These conclusions were presented to the Assembly on 5 September 1949.¹⁴⁰ The resolution was read in the full Assembly on 7 September 1949.

On 8 September the Assembly discussed the draft convention article by article and adjusted it as they went, mostly sticking to the Legal Committee's design.¹⁴¹ The final draft convention was voted on at the end of the day and passed 64-1 with 21 abstentions.¹⁴² The Consultative Assembly's draft included references to the UDHR¹⁴³ and would create a jointly operating commission and court. Under the draft convention, individuals could apply for redress. The proposed structure was complementary to the UN and to national law, and defined a small number of rights. The Consultative Assembly's vote and its draft convention were communicated to the Committee of Ministers for approval and ratification.

When the Committee of Ministers met in private in Paris from 3-5 November 1949,¹⁴⁴ delegates to the Committee had a memorandum from Council of Europe Secretary General¹⁴⁵

¹⁴⁰ *Collected Edition*. Vol II p. 216-226

¹⁴¹ *Ibid.* 214-284

¹⁴² *Ibid.* p. 274. Unfortunately, this is only a summary of the vote, and so the full roll of how delegates from each state voted is not included in the *Collected Edition*. It is likely that this information is in the CoE's archives, but I do not have access to it except in its catalog reference in the online archive catalog (<http://lms.coe.int/uhtbin/cgisirsi/KPYojEOEUP/CENTRAL/127670005/9>)

¹⁴³ *Ibid.* p 276

¹⁴⁴ *Ibid.* pp 296-297.

Jacques Camille Paris containing the Assembly's recommendation and a suggestion to convene a committee of legal experts from member states to draw up a Convention.¹⁴⁶ The Committee of Ministers agreed unanimously to this recommendation and the Chairman of the Committee of Ministers, Gustav Rasmussen of Denmark, communicated the decision to the Assembly on 5 November.¹⁴⁷

The Standing Committee of the Consultative Assembly replied on the 9th of November expressing the Assembly's regret. It feared that the Committee of Experts might ignore the work already done by the Assembly. In its reply, the Standing Committee of the Consultative Assembly stated that it "sees no objection to this question being remitted to a committee of lawyers for study.... The Committee fears that to defer the matter until a decision is taken by the United Nations would mean that the proposal would merely be pigeonholed."¹⁴⁸

Again, the Assembly's and the Committee of Ministers' internal identities constructed the relationship between the UN and the Council of Europe differently. Again, the interactions of the two bodies reflected the Council of Europe's lack of consensus on the relationship between regional and global identities.

¹⁴⁵ *Statute of the Council of Europe*, see note 107 Chapter VI, Articles 36 and 37. The Secretariat is the administrative/bureaucratic arm of the Council who is the intermediary for the Consultative Assembly and the Committee of Ministers.

¹⁴⁶ *Collected Edition*. Vol. II. p 288, "2. Should the Committee of Ministers approve the above recommendation in principle, the Secretary General would suggest... to convene a meeting of experts from Member State with a view to drawing up a draft Convention, which may be used as a basis for later discussions by the Committee on this question."

¹⁴⁷ *Ibid.* p 297. "Le Comité des Ministres... a décidé de charger le Secrétaire Général d'inviter chacun des gouvernements des Etats membres à désigner une personnalité qualifiée pour siéger dans une commission qui sera chargée d'élaborer le projet d'une Convention pouvant servir de base aux discussions ultérieures du Comité sur cette question, tout en tenant compte du progrès fait dans la matière par les organes compétents des Nations Unies."

¹⁴⁸ *Ibid.* p 300.

On 18 November 1949, the Secretary General formally convened the Committee of Legal Experts to sit in February 1950 and draft a Convention on human rights and fundamental freedoms, mindful of the work done by the Assembly.¹⁴⁹

III. The third stage: conflict

Before the committee sat, the Secretary General prepared a series of working papers which included the European Movement's draft, the Consultative Assembly's draft, their attending reports, jurisprudence of the PCIJ, reports on international law conferences, reports from the UN, reports from the Cambridge Institute on International Law and Harvard law school, and comments by member state governments on the draft UN covenant (being discussed at Lake Success at the time).¹⁵⁰ The Committee of Legal Experts took two mandates and a ream of papers and discussed the proposed convention from 2-8 February and 6-10 March, 1950.¹⁵¹

Right from the outset of the discussion, two schools of thought emerged. These two schools contested the normative value of the rights definition's two axes. The first school appealed to state interests and relied on the assumption that state interest structure need to be able to accurately predict the full effect of a provision before accepting it. The other school relied on building member state interest in human right protection gradually by initially defining rights vaguely and allowing the rights room to develop.¹⁵²

¹⁴⁹ *Collected Edition*. Vol. II, p 302-4

¹⁵⁰ *Collected Edition*. Vol. III pp. 2-178

¹⁵¹ *Ibid.* pp. 180-182.

¹⁵² *Ibid.* pp 182-232

The first school, led by the British and Dutch experts, believed the draft Conventions was too vague and therefore unenforceable.¹⁵³ They focused on a pragmatic analysis of contemporary state interests.

Member State delegates need a sufficient definition of rights, they said, to know whether or not their state could fulfill potential convention obligations.¹⁵⁴ They advocated that the Council of Europe refine the draft convention's language by using the tailoring processes ongoing in the UN Commission on Human Rights. Fundamentally, this school claimed that a rigid and easily identifiable list of specifically defined rights held normative value for its ability to clearly express potential obligations to interested, non-signatory states.

The other school, led by French, Belgian, and Dutch delegates believed that the Assembly draft was adequate for the Council's purposes. They focused on an institutional analysis of how international organizations internally operate.

A full enumeration would take too long to do and the refining process couldn't produce an enforceable institution, they argued, because the consensus-building process would be overly burdensome. They proposed a 'Strasbourg System' of human rights protection, which creates an incomplete, but legally sufficient, convention in order to build an effective institution. The institution could then gradually refine the conventions rights' definitions through its jurisprudence.¹⁵⁵ Fundamentally, they advocated a system of general rights that are immediately acceptable to all parties. Flexible institutions with legal jurisdictions could reflect changing concepts of rights and uphold shifting norms.

The two schools could not decide singularly or jointly whether the enforcement mechanism of the Convention should include a court. Since this was ultimately a political

¹⁵³ *Collected Edition* Vol. III. 182-4

¹⁵⁴ *Ibid.* p 234

¹⁵⁵ *Ibid.* pp 256-258

question, they determined the conclusion of the matter inappropriate for their own decision-making authority.¹⁵⁶

These two schools proposed enough contradictory amendments throughout the Committee of Legal Expert's meetings to warrant the production of four alternative versions of the Convention.¹⁵⁷ They organized these four alternatives under two titles (see diagram 8) and communicated them to the Committee of Ministers for their decision.

*Diagram 8. Alternatives Proposed by the Committee of Legal Affairs*¹⁵⁸

Institutional Form	H.R. Articulation	
	Broad	Specific
Comm & Court	A ₍₁₎	B ₍₁₎
Comm w/o Court	A ₍₂₎	B ₍₂₎

The full Committee of Ministers' comparison of the four alternatives began with each member state stating its government's position.

The UK delegation sided with Alternative B and proposed the full definition of rights prior to signing the convention for the stated purpose of an immediately effective structure.¹⁵⁹ Ireland opposed this, stating that the principle aim of the Council of Europe was to prevent any repetition of the recent past. Ireland then advocated the Assembly's first position and for Alternative A.¹⁶⁰ The Netherlands argued for Alternative B because it thought Europe didn't need more general statements and A added nothing to the UDHR. France advocated A, "not because it

¹⁵⁶ *Collected Edition* Vol. IV. P16-18

¹⁵⁷ *Ibid.* pp 278-334.

¹⁵⁸ *Ibid.* p 18

¹⁵⁹ *Ibid.* p 106

¹⁶⁰ *Ibid.* p.108

[was] the path of least resistance,” but because it thought the convention ought to add an institution to enforce human rights already established in national legal systems.¹⁶¹ Italy expressed support for Alternative A to align the regional convention with the already legitimated UDHR.¹⁶² Norway then supported alternative B because the nature of the obligations imposed requires precise definitions to avoid vagary. Next, Greece was explicitly noncommittal. Turkey, stated its preference for A because it was slightly more expansive than B. Belgium and Luxembourg followed suit, although in the committee of experts the Belgian and Luxembourgian experts fought for greater precision.

After these general statements the representatives discussed whether or not there should be a commission and a court, or just a commission. The Netherlands, the UK, Norway, Greece, Turkey were either against a court, solely for the commission, or wanted the potential powers of both clarified.¹⁶³ France, Italy, Belgium, Ireland, Luxembourg, Denmark advocated for a court to exist in the structure proposed by the “Strasbourg System.”

All of these general statements addressed the symbols of the court and the axes of rights. However, relevant provisions which typically cause a great deal of discussion were not addressed. For example, the issue of whether an individuals and states or if only states can engage the institutions was not discussed. Also, once the court’s jurisdiction was identified as complementary it became a courts’ *sine qua non*.

The statements made by member states therefore reflected the debate’s structure, and concentrated on locating rights’ bounds and the existence of a court. They did not focus on issues where consensus was preexisting or previously established.

¹⁶¹ *Collected Edition* Vol IV pp. 108-110

¹⁶² *Ibid.* p. 110

¹⁶³ *Ibid* pp 114-8

The UN's failure to create a Covenant on Human Rights with individual application in June 1950 rallied the Council of Europe's member states around this shared value. The European member states' shared reaction provided a motivating consensus that drove the debate thereafter. It became obvious to delegates that if the UN had denied the right of individual access to global institutions, then Europe would have to do so for itself.

British and Dutch proposals advocating the UN's processes became implicitly tainted in member state's speeches, and the members of the first school were socially coerced into grudgingly allowing the deliberations to move on using Alternative B₍₁₎.¹⁶⁴

iii. Constitution and post-constitution

The final convention included rights regarding the individual, family, and individual legal rights while it excluded socio-economic, political, cultural, and educational rights. It did not reference the location of its rights within the UDHR. The process that identified the ECHR's provisions diluted the influence of the French/British leadership further, as other nations' delegates equally argued and affected the inclusion, exclusion, and definition of certain rights.¹⁶⁵

A major facet of the final text was the inclusion of the non-self destructive clause of UDHR's Article 30 in Article 17,¹⁶⁶ which, as Teitgen explained, allows for the institution to

¹⁶⁴ Grudgingly as in by reserving a right to voice reservations later on. *Collected Edition*. Vol. IV pp 130-8

¹⁶⁵ *Collected Edition* Vol. IV and V

¹⁶⁶ UDHR. Article 30: "Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein."

ECHR Article 17: "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

provoke gradual positive change without falling backwards through providing institutional flexibility. This clause was also stated without acknowledging the UN's UDHR.

Immediately after the Convention was passed, the Standing Committee, the Consultative Assembly and the Secretariat began work on the first protocol. The first protocol included socio-economic and educational rights, which were not included in the 1950 Convention due to internal conflict causing delays. Consensus over these rights developed in late 1951 and early 1952, and the protocol was enacted on 20 March 1952.¹⁶⁷

Since the first protocol, 13 more have passed through the Council. The Council of Europe's member states have ratified all of these 14 protocols.¹⁶⁸ Seven protocols are substantive changes or additions to the individual rights protected by the Court. Six protocols changed the procedure and structure of Court and, formerly, the Commission. The commission was disbanded in the 11th protocol, which was passed in 1998.¹⁶⁹

The most recent constitutional adjustment to the Convention occurred on 18 February 2010, when the Duma of the Russian Federation ratified the 14th Protocol and allowed the ECtHR to make procedural changes. These changes were formulated to streamline the case selection process by loosening complaint-rejection requirements.¹⁷⁰ The Court will conceivably make more landmark decisions, which domestic courts can then implement into their jurisprudence.

The protocols make the court more like a supreme court of appeals. Should an individual exhaust national and then supranational courts, s/he may then resort to the ECtHR's jurisdiction

¹⁶⁷ *Collected Edition* Vol. VII

¹⁶⁸ The Council of Europe. "Recent News" Accessed last 21 February 2010
<http://conventions.coe.int/Treaty/EN/v3News.asp>,

¹⁶⁹ The Council of Europe. "Summary of Protocol 11" Accessed last 2 May 2010
<http://conventions.coe.int/Treaty/en/Summaries/Html/155.htm>.

¹⁷⁰ See note 168

as his/her last hope for redress. However, to understand the protocol process and the courts development since its creation, we must explore how it operates.

C. Conclusions: denouement

Prior to the ECtHR's foundation, the collective identification of internal consensus through a shared reaction to an external action ameliorated member state conflict. Once the UN disappointed member states, their delegates could agree on what the Council of Europe's relationship was to be with the United Nations, how generally to articulate rights in the convention, and what mechanism to protect these rights with. The symbols that actors used to communicate ideas and coerce each other, and the conflict that these communications resulted in, tangentially allowed for consensus to be built on symbols that were taken for granted in the discussion. Therefore, the Council of Europe member states signed the ECHR in 1950 having made a complementary judiciary to protect a general enumeration of a limited number of rights for the individual European citizen.

This section has attempted to show what member states perceived as the Courts *telos* during its creation. It identified the internal conflicts of the Council of Europe and showed that consensus was reached through a collective reaction to external action. The common identity of the region formed the court, and imbued it with an identity. The next section examines what the Court itself did with this identity. It identifies the doctrines and tests the Court wielded to define its role in the European region, and then describes the developmental processes that preceded the Court's contemporary identity.

ii. What it does: The court's functional *telos*¹⁷¹

The European Court of Human Rights has a great deal of case law behind it. Though applications were less frequent before 1989, the court still managed to build a robust case law before the Berlin Wall fell.¹⁷² This case law expresses the Court's internal belief, constructed by its judges and personnel, that the Court's jurisdiction is subordinate to national courts in politically contentious areas. It expresses this belief through the development of doctrines and tests.

The Court has developed the "margin of appreciation" and the proportionality tests to define its relationship to its member states. Through these symbols, the court has created a system to bind the outer limits of the Court's interpretative capabilities by deferring to states when interpreting issues of social morality. Specifically it applies these tests to cases dealing with the limitation clauses of Articles 8-11 which protect the individual's freedom of privacy, home, thought, conscience, religion, expression, and association.¹⁷³

By deferring a margin of appreciation to the states, the Court originally set itself as a complement of national courts that only claims jurisdiction when national courts fail to protect a minimum standard. The interpretations of the Court have gradually narrowed each symbol's deferential meaning, but their usage still expresses the courts' self-identification as a complementary to national courts.

¹⁷¹ All ECHR case law can be found on the COE's database, HUDOC at <http://cmiskp.echr.coe.int/tkp197/search.asp?sessionid=43727640&skin=hudoc-en>. Accessed first 17 October 2009.

¹⁷² Ovey, Clare and Robin C.A. White, *Jacobs & White, The European Convention on Human Rights*, 3rd ed. (Oxford: Oxford University Press, 2002) p. 435-436. Matscher, Franz, Ronald St. J. Macdonald, and Herbert Petzold, eds. *The European System for the Protection of Human Rights* (Boston, Massachusetts: Martinus Nijhoff, 1993) at the Introduction

¹⁷³ ECHR Article 8.2, 9.2, 10.2, 11.2: "...except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

A. The context of the court

Under the ECHR, individuals and member states can apply to the Court's jurisdiction. However, interstate complaints have been rare. Most of the Court's dockets come from individuals accusing a member state of violations. The court's judges are appointed to it by member states, and organized internally into chambers. The Council of Europe enforces the Court's decisions, though member states generally comply with Strasbourg's rulings of their own volition. The actors who operate inside the court are individual judges and administrators. The actors who operate externally to the court are states, individuals, and the various organizations that states and individuals can represent (i.e. corporations, NGO's, the European Union, etc.)

The socially constructed symbols that individuals and the Court use to communicate about normative values in the ECtHR's jurisprudence are doctrines and tests, which judges develop and apply. This paper focuses on the margin of appreciation doctrine and its proportionality tests. By developing these tests, the Court communicates its regional identity internally to its judges and externally to its member states and their leaders. When multiple judges applied the margin of appreciation at different moments, therefore, they reflected how the Court's identity-formation processes function.

B. The Court's Jurisprudence

The Court's Jurisprudence began in the 1950's, and the Court operates today. Applications prior to the Berlin Wall's fall were sparser to the period since the fall, but this did not preclude the Court from building a robust case law.

Compared to similar regional human rights courts, the Inter-American Court of Human Rights and the African Court of Human and Peoples' rights, the ECtHR is more established. This greater establishment reflects the legitimacy of the Court in the eyes of its member states, and their adherence to its jurisdiction is likely its effect. This section examines the development of the margin of appreciation to identify how the Court established itself in the region, and what form the Court exists in today.

Doctrines developed in the Court's jurisprudence through a three-stage process. First the doctrine or symbol was named and recognized. Second, the doctrine was defined. Third, the doctrine was applied, and issues with the identity and definition of the doctrine or test was corrected as necessary. This section studies the margin of appreciation through these developmental stages.

*i. The margin of appreciation*¹⁷⁴

The margin of appreciation doctrine and the proportionality tests developed to implement it are symbols that the Court uses to defer to member state jurisdictions by subject area. Where public morals are at issue, the Court can use the symbol to dodge the question and allow member states to tackle the issue internally. By doing so, the Court communicates to its member states, to individuals, and to itself a 'subordinate-to-states' identity.

¹⁷⁴ Most cases cited below were found through the guidance of three sources, to whose authors I'm indebted: Arai-Takahashi, Yutaka. *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*. (Antwerp: Intersentia, 2001); Mowbray, Alastair. *Cases and Materials on the European Convention on Human Rights*. Second Edition (Oxford, England: Oxford University Press, 2007); and Ovey, Clare and Robin C.A. White, *Jacobs & White, The European Convention on Human Rights*, 3rd ed. (Oxford: Oxford University Press, 2002)

The doctrine was formally identified in the *Handyside* case. The Court developed the proportionality tests prior to the identification of the margin of appreciation in cases of member states violating the ECHR during times of emergency (Article 15). After *Handyside*, the Court refined these tests under the margin of appreciation doctrine in Articles 8-11.

I. Identification

In the 1976 *Handyside* case,¹⁷⁵ the Court first explicitly identified the margin of appreciation as a balance of individual rights and state authorities under the Article 8-11 limitation clauses. These clauses determine that a state action may be permitted if it is “necessary for a free and democratic society.”¹⁷⁶ The doctrine was transliterated from the French Conseil d’Etat’s domestic doctrine, ‘la marge nationale d’appréciation,’¹⁷⁷ which allows the government a degree of moral leeway in its actions.

The issue in *Handyside* was *The Little Red Schoolbook*, a book written and published in Denmark. The book, with contributions from children and teachers, included a section regarding sex. It specifically discussed abortion, homosexuality, intercourse, and masturbation.¹⁷⁸ The applicant was a publisher who produced several thousand copies of *The Little Red Schoolbook* which the London metropolitan police confiscated and destroyed under the authority of the Obscene Publications Act of 1959. The applicant was then levied a fine by the state. The applicant appealed the fine and requested compensation for the destruction of the books within

¹⁷⁵ *Handyside v. United Kingdom* A.24 (1976) 1 EHRR 737 (“*Handyside*”)

¹⁷⁶ ECHR Article 8.2, 9.2, 10.2, 11.2: “...except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

¹⁷⁷ Mowbray, Alastair. *Cases and Materials on the European Convention on Human Rights*. Second Edition (Oxford, England: Oxford University Press, 2007). P 630

¹⁷⁸ *Ibid.* Para. 1

national jurisdiction. When British courts rejected his claims, the applicant brought the case to the ECHR under the right to freedom of expression under Article 10 of the ECHR.¹⁷⁹

The Court found no violation of the Convention by the UK government. It ruled in part that the margin of appreciation allows states “to give an opinion on the exact content of [moral] requirements [where no European standard exists], as well as on the ‘necessity’ of a ‘restriction’ or ‘penalty’ intended to meet them”¹⁸⁰ It accepted that “Article 10 §2 does not give the Contracting States [STET] an unlimited power of appreciation...,” but leaves the establishment of that test for later cases. Instead the Court undergoes a textual analysis of so-called ‘clawback’ or ‘accommodation’ clauses of other legal structures to balance the states and the individuals interests.¹⁸¹

The Court eventually used this textual analysis’ balance of interests focus to build the margin of appreciation’s proportionality tests.

II. Definition

The definition of the margin of appreciation’s balancing exercise predates *Handyside*’s application of the term to the Article 8-11 limitation clauses. Cases over the 1950’s Cyprus

¹⁷⁹ Article 10 ECHR– Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

¹⁸⁰ *Handyside*, supra n. 175 Para 48

¹⁸¹ Arai-Takahashi, Yutaka. *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*. (Antwerp: Intersentia, 2001). p 8

conflict ostensibly invoked the first proportionality tests.¹⁸² The United Kingdom invoked the Article 15 “derogation in times of public emergencies” clause¹⁸³ to argue that, as a state, the UK had a “certain measure of discretion in assessing the extent strictly required by the exigencies of the situation.”¹⁸⁴ The Court agreed and ruled in the UK’s favor in part because state governments are better equipped than the Court to identify the extent and existence of an emergency. This concept was reaffirmed during the Northern Ireland conflict in the cases *Lawless v Ireland*¹⁸⁵ and *Ireland v UK*.¹⁸⁶

The conceptual movement of deference to state discretion from Article 15 into other Articles¹⁸⁷ began in the *Belgian Linguistic* case.¹⁸⁸ In this case French speakers accused the Belgian government of discriminatory treatment in its disparate funding of Dutch- and French-speaking public schools.¹⁸⁹ The Court implicitly used the margin of appreciation doctrine to rule that the Belgian government was not in violation of Article 8 or Article 2 of the First Protocol because states have certain discretion in securing the ECHR’s measures. The Court recognized that a discriminatory violation on the basis of educational language could be possible, just not in the *Belgian Linguistic* case.¹⁹⁰

¹⁸² *Greece v. UK (Cyprus case)*, No. 176/56, (1958-9) 2 Ybk 174

¹⁸³ Article 15 of the ECHR,

«In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.”

¹⁸⁴ See note 182 at 176

¹⁸⁵ *Lawless v Ireland*, Series B (1960-1)

¹⁸⁶ *Ireland v UK*, Judgment of 18 January 1978, A 25

¹⁸⁷ As opposed to rights that can never be legitimately limited: Article 2 (right to life), prohibition of torture (Article 3), prohibition of slavery and forced labour (Article 4), and freedom from *ex post facto* laws (Article 7).

¹⁸⁸ *Belgian Linguistic Case*, Commission’s Report of 24 June 1965, B 3

¹⁸⁹ ECHR Protocol I, Paris, 20.III.1952 Article 2—Right to education, “No person shall be denied the right to education. IN the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.”

¹⁹⁰ See note 185, at 307, Para 401. Also, contrary to footnote 21, p 6 in Takahashi it also appears there that a majority of the court expressly considers art. 14 (prohibition of discrimination on the basis of language) as a potential location for a violation, but determines that this discrimination is balanced by the legitimate aim of the state to promote linguistic unity for the sake of the public interest.

The Court moved the margin of appreciation doctrine further away from Article 15 emergency claims in the *Vagrancy* case.¹⁹¹ Under Belgian vagrancy laws, three separate prisoners who had claimed or had been identified as vagrants were unable to correspond freely with employers, family, and welfare officers while in prison due to their incarceration. They were also required to work in prison until they saved 4,000 Belgian Francs for release.¹⁹² Elderly persons, under these laws, were detained in an assistance home until ready and able to leave. Since they were effectively prisoners of the state, the applicants claimed that the Belgian state violated ECHR Articles 4, 5, and 8 (the freedom from forced servitude, the right to liberty and security of person, and the right to privacy).¹⁹³

The Court found that, although the Belgian government had legitimate reasons to control prisoners' correspondence under Article 8 on account of its "power of appreciation,"¹⁹⁴ the vagrancy laws themselves were violations of the ECHR Articles 4 and 5. Since the case applied the margin of appreciation into the limitation clause of Article 8, it also opened the door for the margin's application to parallel provisions in Articles 9-11 of the ECHR.

The proportionality tests that the Court incorporated into the margin of appreciation doctrine in ECHR Articles 8-11 were paralleled from Article 15 'times of emergency' cases. The Court successfully applied these tests to more mundane issues, and the proportionality tests were applicable to more than just emergency situation cases.¹⁹⁵

¹⁹¹ *De Wilde, Ooms & Versyp v Belgium (Vagrancy Case)*, Judgment of 18 June 1971, A 12.

¹⁹² *Ibid*, Para 18-21.

¹⁹³ *Ibid*, Para 25, 41

¹⁹⁴ *Ibid*, Para 93

¹⁹⁵ See, for instance: *Wille v. Liechtenstein*, Judgment of 28 October 1999; *Rekvényi v Hungary*, Judgment of 20 May 1999; *Funke v France*, Judgment of 25 February 1993, A 256, Para. 55; *Olsson v Sweden (No. 1)*, Judgment of 24 March 1988, A 130; *Silver and Others v United Kingdom*, Judgment of 25 March 1983, A 61, Para 97; *Sunday Times v UK (no 1)*, Judgment of 26 April 1979, A 30; *Klass and Others v Germany*, Judgment of 6 September 1978, A 28, Para 42.

Thus, when these tests were codified in *Handyside* as the ‘margin of appreciation,’ they applied connotations of balancing the interests of a well-meaning government and collaterally affected individuals to the symbol. The margin of appreciation doctrine assumed a well-intentioned government and individuals, and took their conflict as an accident. This exercise of balancing individual and social harms defined the margin appreciation for the Court. The Court, using the margin of appreciation, could ask some questions, but not others; and so, it developed the symbol along some lines, but not others.

Whether the connection between accidental collateral damage and the limitation clauses of ECHR Articles 8-11 was a reflection of a preexisting social identity or was a new phenomenon constructed by the Court, its identification fundamentally shaped the margin of appreciation’s interpretative possibilities.

III. Application

The Court refined the scope of the margin of appreciation more often in Article 8-11 limitation clause cases than in Article 15 derogation cases. Articles 8-11’s limitation clauses’ language are functionally equivalent and the application of the margin of appreciation doctrine is uniform across the Articles.¹⁹⁶ Initially, the court used the doctrine to tacitly accept a separation between the Court and the member states in cases that the Court perceived had resulted from a governmental action’s collateral injury of an individual’s rights.¹⁹⁷

The court developed a three pronged test to apply the margin of appreciation doctrine to cases of governmental interference of rights protected by ECHR Article 8-11 and Article 2 of the

¹⁹⁶ *Silver and Others v UK*, note 66, at Para 85

¹⁹⁷ O’Donnell, Thomas. “The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights” (1982) 4 *Human Rights Quarterly* 474 at 496.

Fourth Protocol. First, the Court examines whether the interference is “in accordance with law”¹⁹⁸ or “prescribed by law.”¹⁹⁹ Second, the Court examines if the interference pursues the legitimate aims explicitly mentioned in the ECHR Articles 8-11s’ second paragraphs. Third, the Courts tests whether the measure is considered “necessary in a democratic society.”²⁰⁰

The following subsections examine each of these three tests to determine how the Court applies the margin of appreciation to cases where individuals challenge states. It shows that the Court’s usage of the margin of appreciation has gradually narrowed the scope of its initial symbolic meaning, but the doctrine is still a powerful tool used to subordinate the Court’s jurisdiction to state authority.

a. Prescribed by national law

In 1979, the Court determined in *Sunday Times* that a governmental interference must satisfy two conditions to be considered ‘prescribed by [national] law.’²⁰¹ First, the law must be accessible to citizens. Second, the law must be sufficiently precise so that its scope and meaning are foreseeable by a citizen. Since the *Sunday Times* decision, this requirement remained unchanged until the early 1990’s, at which point the Court refined the foreseeability requirement and made it easier for individual to claim state violations.

Under the *Sunday Times* definition of this test, an accessible law doesn’t need to be codified or widely published. A law can accessible to citizens if an individual has reasonable

¹⁹⁸ Article 8, para 2; Article 2 of the Fourth Protocol, para 3

¹⁹⁹ Article 9, para 2; Article 10, para 2; Article 11, para 2

²⁰⁰ See, for instance, *Wille v. Liechtenstein*, Judgment of 28 October 1999, para 55 and 56.

²⁰¹ See *Sunday Times v UK* (no 1), Judgment of 26 April 1979, A 30

access to legal advice from an expert. Common law traditions that rely on the development of precedents are not therefore discriminated against under the foreseeability aspect of this test.

In *Chorherr v. Austria*, the Court refined the foreseeability aspect further, and provided a vague tri-partite test of legislation for judges to delineate how strictly to apply foreseeability standards.²⁰² The Court first examines the context of the law, the law's subject area, and the number and the status of the affected citizens (e.g. if it addresses a minority group). The Court then determines whether a citizen could reasonably identify these classifications with legal aid. And finally whether a citizen with legal aid could deduce what might happen to the individual if the individual violated the law. This standard is therefore based on a rational analysis of the restriction's predictability,²⁰³ and since its application has been difficult for defendant states to overcome.²⁰⁴ This is offset by the fact that the application of the foreseeability test is sparse.

b. Legitimate aims

The Court has found only a few cases where a Government lacked a legitimate aim.²⁰⁵ No test really exists to determine whether an aim is legitimate or not. Presumably a judge conducts a rational analysis of the government's position.

The list of governmental aims that the Court has accepted as legitimate include national security,²⁰⁶ territorial integrity,²⁰⁷ the interests of public safety,²⁰⁸ economic well-being of the

²⁰² *Chorherr v. Austria*, Judgment of 25 August 1993, A 266-B, reaffirmed in *Kalaç v Turkey*, Commission's Report of 27 February 1996.

²⁰³ See *Kalaç v Turkey*, para 41 et seq.

²⁰⁴ Arai-Takahashi, Yutaka. *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*. (Antwerp: Intersentia, 2001). p. 11

²⁰⁵ In my reading I only found one: *Darby v Sweden*, Judgment of 23 October 1990, A 187. at para 25-26— a case over a Church tax of a little over 3,000 kroner; about \$533 in 1990. I assume there are others that weren't interesting enough to be published.

country,²⁰⁹ the prevention of disorder or crime,²¹⁰ protection of health or morals,²¹¹ the protection of the rights or freedoms of others,²¹² the prevention of confidential information disclosure,²¹³ and maintaining the authority and impartiality of the judiciary.²¹⁴ Thus, the legitimate aim test in its application has not been changed but has been institutionalized.

c. Necessary in a democratic society

The Court has a more ambiguous time determining whether a state's interference for a legitimate aim is necessary than if the interference is indeed for a legitimate aim. The Court's textual analysis in *Silver* in 1981 shows that judges interpret the phrase "necessary in a democratic society" to mean that "...to be compatible with the Convention, the interference must, *inter alia*, correspond to a 'pressing social need' and be 'proportionate to the legitimate aim pursued.'"²¹⁵ Thus, the Court at this time identified a two part test to determine necessity.

The first part is whether the interference corresponds to a pressing social need by determining whether the national authority shows such a need. The Court has uniformly allowed

²⁰⁶ *Zana v Turkey*, Judgment of 25 November 1997, 27 EHRR 667; *Klass v Germany*, Judgment of 6 September 1978, A 28; *Rekvényi v Hungary* Judgment of 20 May 1999, 30 EHRR 519.

²⁰⁷ *Zana v Turkey* *ibid.* at para 49

²⁰⁸ *Rekvényi v Hungary*, see note 78, at para 41; *X and Y v Switzerland*, 3 October 1978, 13 DR 241; *Buckley v United Kingdom*, Judgment of 25 September 1996 23 EHRR 101

²⁰⁹ *Mialhe v France*, Judgment of 25 February 1993, A 256-C; *Funke v France* see note 66

²¹⁰ *Otto-Preminger Institute v Germany* Judgment of 20 September 1994, A 295

²¹¹ *Handyside* *supra* n. 175

²¹² *Otto-Preminger* see note 209; *Jacobowski v Germany*, Judgment of 23 June 1994, A 291

²¹³ *Weber v Switzerland* Judgment of 22 May 1990, A 177; *Observer and Guardian v United Kingdom*, Judgment of 26 November 1991, A 216; *Sunday Times v. United Kingdom (No. 2)*, Judgment of 26 November 1991, A 217

²¹⁴ *News Verlags GmbH and CoKG v Austria*, Judgment of 11 April 2000, 31 EHRR 246; *Schöpfer v Switzerland*, Judgment of 28 October 1999, 33 EHRR 845; *Wille v. Leichtenstein*, see note 66

²¹⁵ *Silver and Others v United Kingdom*, Judgment of 25 March 1983, A 61, at para 97

states a wide degree of latitude to determine social needs and rarely challenges a states' analysis.²¹⁶

The second part of the test is the proportionality test, which asks whether the interference is proportional by balancing the government's expressed social needs with the law's collateral damage to individual rights. This test historically required the greatest amount of refinement by the Court.²¹⁷

The court applies the proportionality test by answering four questions: Who has the burden of proof? Is there a less restrictive alternative? What happens in other states? And, does the court really want to open this door?²¹⁸

Judges' answers to these questions express four identifiable types of usage for the margin of appreciation doctrine. Arai-Takahashi labels these usages as the: relevant and sufficient method, the less-restrictive approach, the comparative-evolutive method, and the rhetorical usage approach.²¹⁹

1. Who has the burden of proof? The relevant and sufficient method

In a burden of proof analysis, the Court determines which party must prove a law's (dis)proportionality and what evidentiary standard it must meet to do so.

²¹⁶ See, *Handyside* at para 50; and *Dudgeon v United Kingdom*, Judgment of 22 October 1981, A 45, para 45.

²¹⁷ Mowbray, Alastair. *Cases and Materials on the European Convention on Human Rights*. Second Edition (Oxford, England: Oxford University Press, 2007) p 630

²¹⁸ *Leander v Sweden*, Judgment of 26 March 1987, A 116; *Olsson v Sweden (No. 2)*, Judgment of 27 November 1992, A 250; *Gillow v United Kingdom*, Judgment of 24 November 1986 A 109; *Handyside*, supra note 175; *X and Y v Netherlands*, Judgment of 26 March 1985, A 91; *Z v Finland*, Judgment of 25 February 1997; *Dudgeon v United Kingdom*, Judgment of 22 October 1981, A 45

²¹⁹ Arai-Takahashi, Yutaka. *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*. (Antwerp: Intersentia, 2001) pp 190-191, 196

In the beginning of the Court's margin of appreciation usage, the onus was placed on the applicant to show that the national law was disproportionate.²²⁰ However, the Court determined between the 1960's and the late 1980's that the respondent state must defend its law in cases which potentially involve a "serious affront to Convention rights and values."²²¹

These potentially serious affronts include: interference with letters between a counsel and the defendant (1986),²²² encroachments on an individual's sexuality²²³ or discrimination based on gender (1985-1999),²²⁴ discrimination against children birthed out of wedlock (1987),²²⁵ or derogations from the Convention due to exigent circumstances (1959-1978).²²⁶ In determining what constitutes a potentially serious affront to the Convention, the Court expresses a greater willingness to place the onus on its member states.

In determining evidentiary standards, the court relies on a "relevant and sufficient" test. This test determines the level of proof necessary for an applicant or defendant to make their case. These levels range from rational proof, convincing or compelling reasons, or beyond all reasonable doubt.²²⁷ The Court historically applies standards based on the severity of the potential harm done by the discrimination. For example, the regulation of commercial speech is reviewed under a "justifiable in principle" standard,²²⁸ while a court order requiring a journalist to reveal confidential sources is reviewed under the strict scrutiny of the beyond all reasonable

²²⁰ *Handyside* at para 48

²²¹ Arai-Takahashi, Yutaka. *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*. (Antwerp: Intersentia, 2001), p 90

²²² *Schönenberger and Durmaz v Switzerland*, Commission's Report of 12 December 1986, A 137;

²²³ *X and Y v Netherlands*, Judgment of 26 March 1985, A 91; *Dudgeon v UK*, Judgment of 27 September 1999; *Smith and Grady v. UK*, Judgment of 27 September 1999

²²⁴ *Abdulaziz, Cabales and Balkandali v UK*, Judgment of 28 May 1985, A 94; *Burghartz v Switzerland*, Judgment of 22 February 1994, A 280-B

²²⁵ *Inze v Austria*, Judgment of 28 October 1987, A 126

²²⁶ *Lawless v Ireland*, No. 332/57, Commission's Report of 19 December 1959, B 332; The *Greek case*, (1969), 12 Ybk (The Greek Case), p. 72; *Ireland v UK*, Judgment of 18 January 1978, A 25

²²⁷ To oversimplify into a quantifiable example: rational: >50% proven; convincing and compelling: 66.67% proven; and beyond all reasonable doubt: >89% proven

²²⁸ *Markt Intern Verlag GmbH and Klaus Beermann v Germany*, Judgment of 20 November 1989, A 165

doubt standard.²²⁹ The Court differentiates these by whether a regulation has a “potentially chilling effect” on an individual’s ability to express their own rights.²³⁰

Historically the Court has not fundamentally changed its application of evidentiary standards in relation to member states or individuals. The Court has expressed a greater willingness to require the states to bear the burden of proof by defining serious affronts to the ECHR more broadly than before. Thus, the Courts’ usage of this method expresses only that the Court tends to view itself as categorically more important.

2. *Is there a less restrictive alternative?*

The less restrictive approach to proportionality is considered the most stringent forms of the proportionality test by commentators.²³¹ It examines the breadth of a state’s legitimate interference and compares it to less sweeping measures that may be sufficient to attain the same legitimate aim. If a less sweeping measure exists, the Court strikes down the original law and suggests the alternative.

The Court began to use this relative method of determining proportionality in the late 1980’s and 1990’s. It applied this method to cases addressing restrictions on assemblies for

²²⁹ *Goodwin v UK*, Judgment of 27 March 1996, A 544

²³⁰ Ibid. para 42-46. This chilling effect is examined in depth in *Arai-Takahashi* in relation to multiple articles’ case law. It basically entails that some types of State interference with an individual right (particularly expression and association) may threaten the forum in which that right operates, undercutting the right all together, regardless of the state’s intended and usually unrelated purpose.

More concretely, in *Goodwin* the court ruled at para 39 that a court-order to make a journalist reveal their sources could undermine “the vital public-watchdog role of the press... and the ability of the press to provide accurate and reliable information may be adversely affected. Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 (art. 10) of the Convention unless it is justified by an overriding requirement in the public interest”

²³¹ *Arai-Takahashi, Yutaka. The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECtHR.* (Antwerp: Intersentia, 2001), p 15

security and order (1980),²³² prisoner's correspondence (1982),²³³ a statute of limitations on paternity proceedings (1984),²³⁴ rules preventing free speech for the purposes of preventing the defamation of government (1992),²³⁵ rules preventing the incitement of disorder (1995),²³⁶ rules preventing free speech for the purposes of national security (1998),²³⁷ the dissolution of a party for national security (1998),²³⁸ and the discriminatory treatments of homo- or trans-sexuals (1999).²³⁹ The court seems unwilling to use this doctrine in cases regarding property rights (rent controls, license revocation, property tax levying, etc.).²⁴⁰ That is, The ECtHR was unwilling to apply a margin of appreciation in cases over which the European Communities' had regional competence.

In applying a less-restrictive approach to the margin of appreciation, the Court overturned state law to impose more precise restrictions that accomplished the stated legitimate aims of the state. This approach is a compromise approach for the Court: it allows the Court to legitimately coerce states in the protection of human rights while simultaneously acknowledging the states' margin of appreciation. In effect, the less-restrictive approach is the Court's modern tool for a conciliatory repudiation.

The Court's development of this approach in the 1990's expressed its willingness to encroach into state sovereignty. By co-opting the margin of appreciation and using it to suggest

²³² *Christians against Racism and Fascism v UK*, Decision of 16 July 1980, 21 DR 138

²³³ *Campbell and Fell v UK*, Commission's Report of 12 May 1982, A 80; *Campbell v UK*, Judgment of 27 September 1999.

²³⁴ *Rasmussen v Denmark*, Judgment of 28 November 1984, A 87

²³⁵ *Castells v Spain*, Judgment of 23 April 1992, A 236

²³⁶ *Piermont v France*, Judgment of 27 April 1995, A 314

²³⁷ *Incal v Turkey*, Judgment of 9 June 1998; *Ahmet and Sadik v. Greece*, Commission's Report of 4 April 1995.

²³⁸ *The Socialist Party and Others v Turkey*, Judgment of 25 May 1998

²³⁹ Though the usage of less-restrictive measures on cases on homosexuality (*Lustig-Prean and Beckett v UK*, Judgment of 27 September 1999; *Smith and Grady v UK*, Judgment of 27 September 1999) and transexuality (*Sheffield and Horsham v UK*, Commission's Report of 21 January 1997) are entwined with evolutive principles, discussed below, and the Court appears to use the less restrictive approach in order to avoid a more sweeping ruling.

²⁴⁰ *Mellacher and Others v Austria*, Judgment of 19 December 1989, A 169; *Tre Traktörer AB v Sweden*, Judgment of 7 July 1989, A 159; *Hentrich v France*, Commission's Report of 4 May 1993, A 296-A

better policies, the Court expressed that it still relates itself to states through the margin of appreciation but it perceives it can get away with more.

By using the margin of appreciation the Court concedes that the Court is subordinate to the states' authorities. This approach, however, gradually limits the margin of appreciations' subordinate connotations by co-opting the symbol. By repudiating governments without claiming an ECHR violation the court recontextualizes the margin of appreciation doctrine.

Recontextualizing the symbol necessarily implies that the Court accepts the margin of appreciation's structure but wants to change certain connotations. The Courts' usage of this method attempts to down-play the assumption that governments are always well-meaning in exchange for the idea that governments are well-meaning but sometimes inept.

Secondly, the Courts usage of the less-restrictive approach shows the Court's ambition. The attempt to change the margin of appreciation through a conciliatory approach accepts the limitations of its environment— namely that its authority stems from its member states— but tries to expand its powers. By offering a less-restrictive alternative, the Court fundamentally implies that it can legislate better than member state legislatures. This implication requires a judge to believe that the Court and he/she are able to perceive societies' normative values and apply them. This belief requires a judge to have ambition for him/herself and for the Court as a whole.

Multiple judges' usage of the less-restrictive approach to the margin of appreciation implies that the Court as an institution believes that the normative value of subordinate ECtHR is eroding.

3. What happens in other states? The “comparative-evolutive” method²⁴¹

The Court uses the “comparative-evolutive” method to compare and contrast member state practices. It then discerns whether common European mores or procedural standards have evolved. Judges apply these two tests in tandem, fearing that to do otherwise might compromise the autonomy of the Convention.²⁴² By employing an evolutionary test, the court relates developments in member states to the Convention. This action relies on the Conventions’ vaguely constituted provisions to justify dynamically interpreting its provisions in relation to member state law.

The Court utilized the “comparative-evolutive” method first in the late-seventies. Since then it typically applies the method to cases of marginalized classes and usually finds a reason to expand individual’s rights.²⁴³ This method has consistently used the margin of appreciation doctrine to positively identify European mores and then incorporate them into the ECHR by targeting states that drag their heels. This method operates on the premise that the Court keeps states up to date on common interpretations of individual rights. Judges, in applying this method, express a belief that while the ECtHR may well be the defender of the lowest common denominator of European rights, common rights are themselves expanding. It institutionalizes

²⁴¹ Although ‘evolutive’ is not a real word, the Court applies it to its evolutionary test in the *Winterwerp* case and has stuck with it ever since. See, *Winterwerp v the Netherlands*, Judgment of 24 October 1979, A 33;

²⁴² Matscher, Franz, Ronald St. J. Macdonald, and Herbert Petzold, eds. *The European System for the Protection of Human Rights* (Boston, Massachusetts: Martinus Nijhoff, 1993), at 70-73

²⁴³ It applied the method to cases involving: the equal of treatment for officers and servicemen in certain areas, the equal treatment of persons of unsound mind, the differential treatment of illegitimate children, the private rights of homosexuals, the protection of journalistic sources, the severity of a loyalty system, government-run media monopolies, public access to information, restrictions on political parties, the gender makeup of fire brigades and public jobs, and hereditary laws.

See: *Winterwerp v the Netherlands*, Judgment of 24 October 1979, A 33; *Marckx v Belgium* Judgment of 13 June 1979, *Dugeon v UK*, Judgment of 22 October 1981, A 45; *Lustig-Prean and Beckett v UK*, Judgment of 27 September 1999; *Smith and Grady v UK*, Judgment of 27 September 1999; *Goodwin v UK*, Judgment of 27 March 1996; *Glaser v Germany*, Commission’s Report of 11 May 1984, A 104; *Informationsverein Lentia and Others v Austria*, Judgment of 24 November 1993, A 276; *Guerra and Others v Italy*, Commission’s Report of 19 February 1998; *Sigurdur Sigurjonsson v Iceland*, Judgment of 30 June 1993, A 264; *United Communist Party of Turkey and Others v. Turkey*, Judgment of 30 January 1998; *Karlheinz Schmidt v Germany*, Commission’s Report of 14 January 1993, A 291-B; *Inze v Austria*, Judgment of 28 October 1987, A 126

the Court as complementary to member states by reacting to rather than enacting evolving practice.

4. *Do we really want to open this door? The rhetorical approach*

The Court also applies the rhetorical usage approach to the margin of appreciation doctrine. In politically sensitive cases, the Court can reference the principle of margin of appreciation, apply a high standard to disprove proportionality, and never actually conduct an identifiable test.²⁴⁴ Judges might rely on a rational study of the facts to determine strict proportionality.²⁴⁵ Judges might also just reference the doctrine, implicitly use strict proportionality, and dismiss the individual claim.²⁴⁶ The court has been accused of softening an adverse finding's impact by using the margin of appreciation as a "window-dressing" in secondary or tertiary claims.²⁴⁷

C. Conclusions: the ECtHR's jurisprudence

The Court uses the margin of appreciation to gradually transfer jurisdictional authority over human rights issues from states to the Strasbourg Court. The Court uses the four methods of applying the proportionality test to meekly challenge the state governments, co-opt state authority, defer to the majority of state law, or mitigate adverse findings.

²⁴⁴ Arai-Takahashi, Yutaka. *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*. (Antwerp: Intersentia, 2001), p 2

²⁴⁵ *Z v Finland*, Judgment of 25 February 1997; *Dudgeon v United Kingdom*, Judgment of 22 October 1981, A 45

²⁴⁶ *Leander v Sweden*, Judgment of 26 March 1987, A 116; *Olsson v Sweden (No. 2)*, Judgment of 27 November 1992, A 250; *Gillow v United Kingdom*, Judgment of 24 November 1986 A 109; *Laskey, Jaggard and Brown v United Kingdom*, Judgment of 19 February 1997; *Handyside*, supra note 175; *X and Y v Netherlands*, Judgment of 26 March 1985, A 91

²⁴⁷ Arai-Takahashi, p 232.

The margin of appreciation doctrine is therefore still used to balance two ostensibly legitimate interests: the states' interest to protect their national society, and the individual's interest to maintain their rights. The Court assumes in these cases that the actors act in good faith, but have opposing interests. However, this identification appears to be changing, as the Court begins to portray actors as well-meaning but inept.

These changing perceptions require that judges firstly believe that the Court acts complementary to national jurisdictions. Secondly, the Court's judges must perceive that the Court has an agency with which it can coerce member states' to protect more than the *lowest* common European values.

But, by expressing these changing beliefs in the context of the margin of appreciation doctrine, the Courts' judges bind the Courts' agency within the constraints of its treaty structure. Judges aspire to make the Court more supranational but operate using intergovernmental language. Therefore, the ECtHR's has used the margin of appreciation to cautiously and gradually transfer jurisdictional authority over human rights issues from states to the Strasbourg Court.

i. What it is and what it does: comparing the ECtHR's constitutive and functional *teli*

Delegates approaching the Council of Europe to create a European Convention of Human Right, leaders of state governments who signed the Treaty of Rome on 4 November 1950, judges, administrators, advocates, and the individuals who applied to the Court all were parts of the creation and development of the Court today. They collectively defined and refined the Court's social *telos* as they perceived, internalized, and acted on their external environment.

Actors approached the Council of Europe with various changeable conceptions about human rights, international courts, one another, and about the social realities of Europe and the world in general. Using symbols of UN processes, axes of protectable rights, and concepts of courts to argue about the normative values of and in a human rights convention these actors also argued over the normative value of their conceptions of reality. These deliberations focused on areas of conflict and resulted in an impasse, until an external action exposed areas of consensus that the delegates had taken for granted. Once the UN had galvanized regional opinion to develop a vague set of common rights that could be immediately institutionalized, the Council of Europe, its member states, and the individuals produced new symbols.

The Strasbourg system was then populated by judges, advocates, and individual European citizens, who in turn brought other variable conceptions of reality. Individuals increasingly used the Court system to challenge the actions of their governments, and the Court's judges and lawyers had ample opportunity to interact with governmental representatives. These actors used the symbol of the margin of appreciation doctrine to communicate ideas about the

institution, its components, and reality. In the process, these individuals defined and refined both the symbol and the institution.

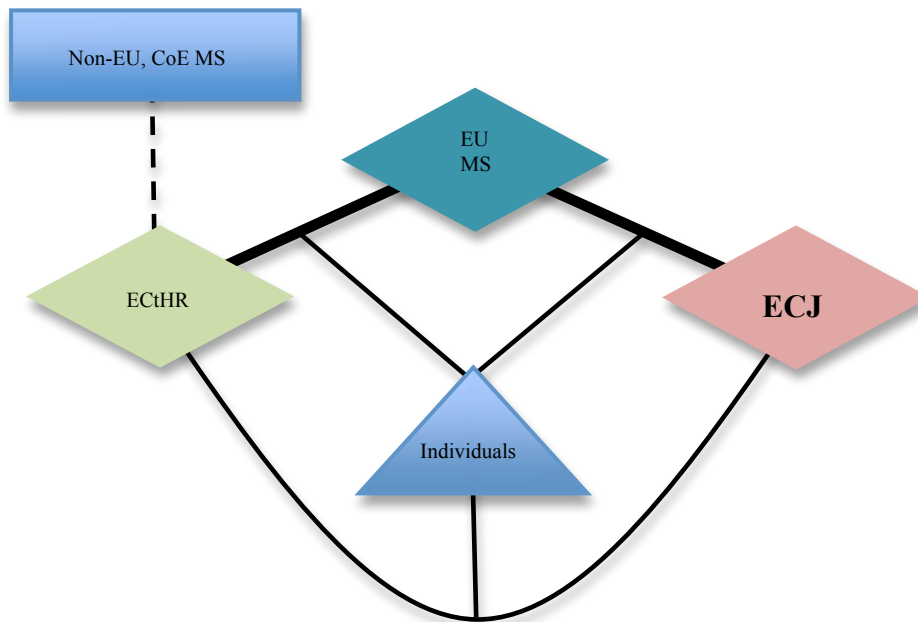
These feedback loops of actors perceiving, analyzing, interacting, and reacting and doing it all over again were structured by common assumptions about the Court. This chapter identifies some of these assumptions. First, actors on the whole assumed that a regional identity could functionally co-exist with a global identity, and that the two were inherently different. Second, the actors assumed that by co-opting a symbol and redefining it gradually an institution increase its agency within its preexisting constraints.

The European Court of Human Rights was founded as an intergovernmental court with an effective complementary jurisdiction over the member states of the Council of Europe. Today, the Court cautiously pushes against its member state's constraints as a complementary jurisdiction, but remains intergovernmental.

This Chapter has shown the gradual development of the ECtHR's identity from its constitution through its functioning to today. By examining the usage of the UN/CoE relationship, the axes of protectable rights, and the enforcement method in normative arguments this Chapter illustrated that external actors defined the ECtHR as a complementary jurisdiction to national courts. By examining the development of the margin of appreciation doctrine and the proportionality tests this chapter showed that the Court internally identifies itself as a complementary jurisdiction but wants more authority. Chapter III examines the identity of the ECJ by analyzing its historical functioning and internal identity compared to its externally constituted identity and recent jurisdictional expansion. Chapter IV concludes this paper by

relating this chapter on the ECtHR to chapter III on the ECJ and developing a prediction for the future of the European human rights regime.

Chapter III. The European Court of Justice



The European Court of Justice is the supranational judiciary of the European Union. The Court has operated since 1952, when it functioned as the judiciary of the European Coal and Steel Community. Its competences are limited by the European Union's treaties. Under the treaties' authorities, the ECJ functions as a regional organ both internally and externally. The Court adjudicates all matters of community law— whether related to the treaties, the secondary legislation of the community's organs, or the general principles that emanate from them.²⁴⁸

After the Lisbon treaty passed in December 2009,²⁴⁹ the Court's competences have expanded into the protection of individual rights through the ratification of the Charter of Fundamental Rights.²⁵⁰ The Court has grown into a new area through member state mandate. This area converges on the jurisdiction of the ECtHR. Member states have therefore given the

²⁴⁸ That is, regulations, directives, decisions or opinions, see Chapter I, p. 22

²⁴⁹ *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community* can be found in the Official Journal of the European Union (2007/C 306/01), online at the Commission's website <http://www.consilium.europa.eu/showPage.aspx?id=1296&lang=en>

²⁵⁰ Ibid. Article 6

Court a new constitutive *telos*, after the Court had already developed a functional *telos*. This constitutive *telos* is problematic because the two regional courts dually have jurisdiction over the EU member states.

This chapter examines the jurisprudence of the ECJ and the foundation of the Charter of Fundamental Rights and Freedoms to understand how the ECJ relates to individuals and states. By beginning with an analysis of the Court's case law prior to the Charter's 2009 constitution, this chapter first establishes what the Court *does* with its given jurisdiction. Second, this Chapter examines the history of the Charter's founding to establish what the court's individual rights jurisdiction *is* today.

The chapter concludes that the ECJ is supranational organ that tends to quickly expand its authority into member state jurisdictions when given a narrow area of competence. The Charter widens these competences significantly. The Court therefore has divergent endogenous and exogenous purposes.

i. What it does: the Court's functional *telos*²⁵¹

The Court's constitutive *telos*, its exogenous purpose, has just entered into law. Actors inside the Court have not had time to internally define its purpose under the new human rights laws. Therefore, to establish how the Court internally processes identity, this section examines how the European Court of Justice's judges, advocates, and European individuals constructed the role of the ECJ in the European region in its pre-2009 jurisprudence. This jurisprudence has

²⁵¹ Cases referenced from 1998 onward can be found online at either <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en> or <http://eur-lex.europa.eu/en/index.htm>. Case law before 1998 can be found in the European navigator at <http://www.ena.lu>. Most cases were pointed out by Kaczorowska, Alina. *European Union Law*. (London, UK: Routledge-Cavendish, 2009)

historically focused on international economic and corporate law as these areas comprised its competences. International economic and corporate law deals with issues like import duties, chemical labeling practices, and corporation's legal rights, for example.

This section therefore examines what the court did with its corporate law jurisdiction to determine how the Court used symbols to historically express its internal identification of its relationship to member states and individuals. The symbols this section examines are the direct effect and supremacy doctrines.

This section is divided into three subsections. The first subsection identifies relevant actors who interact under the Court's institutional structures and introduces the direct effect and supremacy doctrines as symbols. The second subsection examines the development of the direct effect and supremacy doctrines to distinguish how these symbols were identified, defined, and applied. The third and final subsection concludes by relating the direct effect and supremacy doctrine to reconstruct the ECJ's role in the European region. It finds that the ECJ, given a narrow band of law, wields the direct effect and supremacy doctrines to categorically refuse to defer to national courts and actively subsume member state law.

A. The context of the Court

Individuals, states, corporations, and the Union organs can apply to and face trial in its jurisdiction. Its judges are appointed by the member states, but internally organize into chambers of 3, 5, or 13. Since the Court operates collegiately and all opinions come from the Court as a whole, minority opinions are not procedurally possible. The European Commission enforces the Court's judgments and penalizes states for failing to adhere to the ECJ's decisions. If a member

state refuses to adhere to the Court's decisions, the Commission can initiate the EU's expulsion procedures against that state.²⁵²

The symbols that the ECJ uses to express its jurisdiction's relationship to national courts are the *direct effect* and *supremacy doctrines*.²⁵³ The direct effect doctrine is the Court's requirement that national courts procedurally apply community law whenever they can. The supremacy doctrine justifies this procedural requirement by substantively subordinating national law to community law. European actors have constructed these doctrines to define the Court as a supranational court that expands quickly into whatever jurisdiction the EU's treaty law provides it.

B. The Court's jurisprudence

The Court's jurisprudence began in 1952, and the Court operates today. Though applications from individuals have increased since the early 1990's, the difference between pre-Berlin application rates and post-Berlin application rates are not as significant as in the ECtHR. Most individual applications to the EU have related to corporate and trade issues, since the Court's competences were limited to these areas prior to the Lisbon Treaty.

This section examines the Court's economic jurisprudence to show how the Court has developed the direct effect and supremacy doctrines. This development in turn shows how the Court has historically internally defined its jurisdictional role in Europe.

The Court used the direct effect principle as a procedural tool to coerce states into applying a monist framework of regional legal structures within its national courts. The Court

²⁵² This has never happened.

²⁵³ The supremacy doctrine is also called the *primacy doctrine*.

developed the supremacy doctrine as a substantive tool to convince states into accepting a monist framework. These tools, therefore are related in their ends, but differ in their means.

As in the ECtHR, the Court developed its doctrines through a three-stage process: identification, definition, and application. First, the doctrine was named and recognized. Second, the doctrine was defined. Third, the doctrine was applied. During application, the conflicts between the Court's changing internal identities and interests and the doctrine's stationary definition were corrected as necessary. This subsection studies the direct effect doctrine and the supremacy doctrine, in turn, through these developmental stages.

i. The direct effect of community law

The ECJ created the direct effect doctrine as a procedural tool to apply community law within national courts' jurisdictions. The direct effect principle is the doctrine that requires national courts to apply community law within their jurisdictions when applicable community law exists. The Court identified the principle broadly and has since limited the doctrine's scope.

When wielding the direct effect doctrine, the Court communicates ideas about the role of the community law's jurisdictional processes to itself and to others. Historically, the Court used the direct effect doctrine to promote the existence of a monist legal framework in the European region. In a narrow area of this monist framework, the Court expressed that its jurisdiction has final authority.

This subsection traces the Court's development of the direct effect from its identification and definition in *Van Gend en Loos* to its common usage today.²⁵⁴ This subsection identifies the direct effect doctrine as a procedural symbol the Court invokes to communicate its role as a monist legal authority within the regional legal structure by co-opting national courts. It also shows that the Court is primarily concerned with constraining state behavior.

I. Identification

In *Van Gend en Loos*, the European Court of Justice held that community law conferred obligations and rights onto individuals which national courts must protect even if the court must contradict national law.

Van Gend en Loos involved a chemical company that had imported urea-formaldehyde into the Netherlands from Germany after the Netherlands enacted new Benelux tariff legislation. The new legislation reclassified the chemical into a higher duty range, and the Netherlands charged van Gend the higher duty. The company challenged the increase as a violation of Article 12 (Discrimination on the basis of nationality) of the Treaty on the European Community ("TEC"). Van Gend had first appealed the process within Dutch courts, but to no avail. The Court ruled in favor of the van Gend en Loos Corporation and identified the direct effect principle as a *sine qua non* for the community to effectively enforce its treaty-law.

In *Van Gend en Loos* the Court used a rhetoric to describe the direct effect doctrine that presupposed its necessity. The doctrine was a *sine qua non* for community functioning. For the doctrine to be a prerequisite of the Community, the Court had to perceive its role in the region as at the head of a monist hierarchy.

²⁵⁴ Case 26/62 *Van Gend en Loos* [1963] ECR 3

This rhetoric dictated to other actors the doctrine's functional language— namely, the doctrine assumes the Court's final authority in its area of competences.

II. Definition

The direct effect concept was first broadly enunciated by the Permanent Court of International Justice in the case *Concerning Competences of the Courts of Danzig* (3 February 1928, Series B, No. 15).²⁵⁵ The PCIJ conferred obligations and rights on individuals in regard to treaties whose intentions were explicitly to do so. However, the European Court of Justice ignored the PCIJ's intent requirement in *Van Gend en Loos*. The Court ruled broadly that the direct effect applies to all forms of community law, whether they explicitly or implicitly confer obligations and rights.²⁵⁶

Van Gend en Loos therefore explicitly defined the direct effect principle as a blanket requirement for national courts.²⁵⁷ To argue that the doctrine had no real limitations, the Court necessarily presupposed that the Union had full control over the development and implementation of its law. In this view, any national law that externally undermines the region's monist structure has to be invalidated. The Court's broad definition therefore reflected its belief that the community was at the top of the region's jurisdictional food chain in its competence areas by asserting its unlimited direct effect onto the national courts.

²⁵⁵ Found in Spiermann, Ole. *Intenational Legal Argument in the Permanent Court of International Justice*. (Cambridge, UK: Cambridge University Press, 2005), pp 270-273.

²⁵⁶ Case 26/62 *Van Gend en Loos* [1963] ECR 3 at Section B

²⁵⁷ Ibid. at Section B

In its definitional stages, which also occurred in the *Van Gend en Loos* case, the Court constructed the direct effect principle as an unlimited symbol of the Court's final authority within national courts.

III. Application

In subsequent cases,²⁵⁸ the Court refined the definition of the direct effect principle and limited its meaning. It first supplied necessary conditions for a community law to be directly effective. It then identified how a national court can legitimately apply the direct effect principle through dual axes analysis of the actors and laws involved in the dispute. The Court therefore limited the direct effect doctrine's meaning by narrowing who and what can apply it. The Court narrowed what community law can apply direct effect by supplying necessary conditions to the direct effect doctrine. The Court narrowed who can claim and rely on the direct effect by delineating claims along two axes. The following subsections describe these refinements in turn.

a. Direct effect's necessary conditions

Direct effect is necessarily a binary test (i.e. it applies or it doesn't). Therefore, to determine when direct effect applies to a community provision, the Court applied three necessary conditions. First, a provision of community law must be sufficiently clear. Second, the provision must be precise. And third, the provision must be unconditional. In order for a community law's provision to be directly effective in national courts, it must satisfy all three conditions.

²⁵⁸ Case 148/78 *Ratti* [1979] ECR 1629; Case 8/81 *Becker* [1982] ECR 53; C-236/92 *Comitato di Coordinamento per la Difesa della Cava v Regione Lombardia* [1994] ECR I-483

The Court defined the term “unconditional provisions” in the late 1960’s. A provision of law is unconditional if it can be applied without further action at the national or community level.²⁵⁹ In the early 1980’s the Court established that conditional statements attached to a provision by community organs may delay its direct effect in national jurisdictions, but a conditional statement made by a member state based on procedural grounds cannot delay or nullify a law’s direct effect.²⁶⁰

The Court defined “clear” and “precise” in 1981 to mean that the law must be rationally understandable to a citizen with adequate access to a community or national judge’s interpretation.²⁶¹ This refinement implicitly glossed the ECtHR’s *Sunday Times* decision from 1979 into community law.²⁶²

By paralleling the ECtHR’s rulings in its case law, the Court did two things. First, it limited the blanket requirement of *Van Gend en Loos*. Second, it connected its jurisdictional processes fundamentally to the ECtHR’s jurisprudence.

Therefore by applying necessary conditions to the direct effect in the early 1980’s the Court communicated two ideas about its changing role. First, it maintained that a monist hierarchy existed in its areas of competence. Second, the Court expressed its self-recognition as an institution embedded in a regional jurisdictional structure.

²⁵⁹ Case 27/67 *Fink Frucht* [1968] ECR 223; and broadly in Case 57/65 *Lütticke* [1966] ECR 205, where Member States have no discretionary powers in relation to Article 90(3) of the TEC;

²⁶⁰ Case 8/81 *Becker* [1982] ECR 53

²⁶¹ Case 203/80 *Casati* [1981] ECR 2595

²⁶² See Chapter II, p 73; *Sunday Times v UK* (no 1), Judgment of 26 April 1979, A 30

b. Applicability standards

The Court provided national courts applicability standards to apply the direct effect doctrine in the 1990's in *Marleasing*.²⁶³ It defined the direct effect principle as operating along two axes. The Court labeled cases where an individual relies on community law against a governmental organ of the EU or a member state as the *vertical* application of direct effect. The Court labeled cases where an individual relies on community law against another individual as the *horizontal* application of direct effect. Provisions that apply vertically do not necessarily apply horizontally. However provisions that apply horizontally also apply vertically.²⁶⁴

In *Marleasing*, an individual applicant relied on an EC directive²⁶⁵ against a corporation. The applicant alleged that the corporation was created as a front to defraud its creditors, i.e. the applicant. The Court ruled that directives could not on their own apply to claims between individuals because directives are primarily intended to constrain state action. Thus the Court created the distinction between vertical and horizontal direct effect when it deferred an individual-individual case to national jurisdictions.²⁶⁶

The Court ruled that national courts were obliged to interpret national law “so far as was possible”²⁶⁷ to account for the directive in cases between individuals. The *Marleasing* decision

²⁶³ Case C-106/89 *Marleasing* [1990] ECR I-4135

²⁶⁴ See: Case 6/64 *Costa* [1964] ECR 585; Case 77/72 *Capolongo* [1973] ECR 611; Case 120/73 *Lorenz* [1973]; Case 251/78 *Denkavit* [1979] ECR 3369.

²⁶⁵ A legislative act that directs and binds specific states' toward accomplishing a specific end. Directives don't usually provide a means to the end and allow states to choose its implementation process. (Article 243 of the TEC). Compare this to regulations, which immediately apply to all EU member states. See Chapter I. p24

²⁶⁶ The flip side of the coin is that provisions that affect individual behavior must also affect state behavior, and therefore all provisions with horizontal direct effect have vertical direct effect.

²⁶⁷ *Ibid.*

has since been interpreted to mean that horizontal applications of direct effect rarely emanate from secondary law.²⁶⁸

The Court had implicitly refined the vertical application of the direct effect in the 1980's, but applied these refinements to the doctrine in the early 2000's. In the 1980's, individuals relied on directives²⁶⁹ against governmental bodies in national courts on the basis of their direct effect. The Court provided national courts three tools to identify when and how to vertically apply a directive through the direct effect doctrine. These tools are all wielding direct effect's vertical application against member state's government.

First, where a government incorrectly implements a directive national courts must apply the directive's provisions instead of the national provisions.²⁷⁰ Second, where a government fails to implement a directive in the given time frame, the government can't rely on directive provisions against an individual.²⁷¹ Third, governments can't rely on a directive alone against an individual in criminal proceedings.²⁷²

In providing applicability standards to the direct effect doctrine, the Court defined its role in relation to the European region. The Court was not a court where individuals could rely on community law against other individuals. The Court was a court where individuals could rely on community law against governments in almost every case. Thus, the Court communicated from the late 1980's to the early 2000's its belief that its role in Europe was to adjudicate conflicts between individuals and their governments. However, while doing so the Court maintained its

²⁶⁸ Case C-91/92 *Faccini Dori* [1994] ECR I-3325; See also, generally, Kaczorowska pp 305-306.

²⁶⁹ See Chapter I p 18

²⁷⁰ Case 14/83 *Von Colson and Kamann* [1984] ECR 1891, Case 31/87 *Beentjes* [1988] ECR 4635, Cases C-397 to C-403/01 *Pfeiffer* [2004] ECR I-8835.

²⁷¹ Case 80/86 *Kolpinghuis Nijmegen* [1987] ECR 3969, Cases C-397 to C-403/01 *Pfeiffer* [2004] ECR I-8835.

²⁷² Case C-271/91 *Marshall* [1993] ECR I-4367, Case C-319-93 *Vaneetveld* [1994] ECR I-763, Case C-91/92 *Faccini Dori* [1994] ECR I-3325.

role at the head of a monist legal hierarchy, and wielded the direct effect doctrine against member state authority.

The Court, therefore, in the 1990's and 2000's began to identify itself as a supranational court at the head of a narrowly defined monist hierarchy that is embedded within the European regional legal structures and constrains state behavior.

IV. Conclusions: the direct effect doctrine

The Court identified the direct effect doctrine strongly but then limited its application. When invoking the direct effect principle, the Court co-opts a national court's jurisdiction to apply community provisions. Usually, the application of direct effect is detrimental to state governments. The ECJ has deferred a margin of interpretative authority to national courts by allowing national courts to determine when and how to apply direct effect to community provisions. However, the Court maintains its ability to interpret the direct effect principle itself and thus maintains final authority to wield the doctrine.

The Court uses the direct effect principle as a procedural tool to communicate ideas about its role to member state governments. While adjudicating cases of individuals' conflicts with a member state, the Court has communicated three ideas. First, the Court embedded itself within the European legal structures by applying the ECtHR's tests to its own doctrines. Second, the Court constructed itself as primarily affecting the relationship of the individual to a state. Third, the Court has maintained its position at the head of a monist legal hierarchy.

In the process of constructing a procedural symbol to apply a narrow regional legal monism, the Court necessarily assumed that the substance of community law also existed above the substance of national law. Otherwise, the Court could not have justified the sine-qua-non principle that justified the doctrine in the first place. In order for community law to be directly effective to assure the community's effectiveness, the Court had to believe that community law had to be effective over national law. This assumption was codified and refined under the supremacy doctrine.

ii. *The supremacy of community law*

The ECJ created the supremacy doctrine as a substantive tool to justify the direct effect of community law in national courts' jurisdictions. The supremacy doctrine elevates the substance of all community law above the substance of all national law. The Court identified the principle broadly and has maintained its breadth in all but the most marginal areas of community law.

The Court, in developing the supremacy doctrine, has communicated ideas about the role of community law's substance in the European region to itself and to others. When wielding the principle, the Court promoted the existence of a regional legal monist framework in its area of competence.²⁷³

²⁷³ See generally, Case 6/64 *Falminio Costa v. ENEL* [1964] ECR 585, 593; Case C-143/88 and C-92/89 *Zuckerfabrik Südreithmarschen AG v Hauptzollamt Itzehoe* and *Zuckerfabrik Soest GmbH v Hauptzollamt; Paderborn* [1991] ECR I-415; Case 14/68 *Walt Willhelm* [1969] ECR 1; and Atkin, James and Baron Atkin, in M. Akehurst. *Modern Introduction to International Law*. (London: Harper Collins, 2007) p. 45

This subsection traces the Court's development of the supremacy doctrine from its identification in *Costa v. ENEL* to its common usage today.²⁷⁴ The subsection identifies the supremacy principle as a substantive symbol that the Court invokes to communicate its role as the overarching Court of a uniformly monist legal system in a narrow area of law.

I. Identification

The Court's first used the supremacy doctrine in 1964 in *Falminio Costa v. ENEL* ("*Costa*"). The Court explicitly identified the direct effect's assumption of a legal hierarchy within the doctrine.

In *Costa*, a shareholder of a privately owned electricity provider refused to pay his ENEL electricity bill. He argued that the Italian nationalization of its electricity system in 1960, which subsumed his share of the private company, was illegal under community law. The Italian Giudice Conciliatore asked for a preliminary ruling from the European Court of Justice about whether community law could confer actionable rights and obligations on the individual. The Court ruled that Article 177 of the TEC²⁷⁵ granted all of community law supremacy over national law wherever community law has direct effect. The Court ruled in favor of the Italian government, however, because it found that the EEC provision the applicant relied on was not directly effective, and therefore not supreme.

The Court ruled that in order for community law to maintain an effective legal basis, the substance of community law cannot be overridden by any member state law.²⁷⁶ From this perspective, member states subsumed their sovereign legislating powers to the community's body of law in order that the community's laws could have effect.

²⁷⁴ Case 26/62 *Van Gend en Loos* [1963] ECR 3

²⁷⁵ *Treaty Establishing the European Communities*. 1957 see Chapter I, p 18

²⁷⁶ *Ibid. Costa*. para 3; *Willhelm* para. 6

The Court initially identified the supremacy doctrine as applying to any community provision that was directly effective in national courts. This did two things. First, it linked the supremacy doctrine to the direct effect doctrine by expressing implicit assumptions made and the rhetoric used in *Van Gend en Loos*. It identified the supremacy doctrine as a different side of the same monist coin with the direct effect doctrine. Second, the Court reaffirmed that community law was above national law, by identifying community as substantively greater than national law wherever it exists. Through these two facts the Court communicated that it is an overarching jurisdiction in Europe in the areas of community law.

II. Definition

As shown above, the definition of the supremacy doctrine occurred generally in *Van Gend en Loos*. *Van Gend en Loos* established the supremacy of the community's primary law by requiring national courts to procedurally apply community law in its decisions, but did not label the principle's application to the substance of either law. *Costa* labeled *Van Gend en Loos*' substantive presupposition, and adopted its assertion of a monist legal structure through arguments of necessary conditions.

The supremacy doctrine was therefore also defined by a blanket requirement that without which the Union's authority would be ineffective. This rhetoric would be reaffirmed throughout the Court's subsequent application of the principle.

III. Application

Between 1969 and today, the Court applied and refined the meaning of the supremacy doctrine. In its application, the Court delimited what community laws and what national laws the supremacy principle super- or subordinates.

This subsection is broken into two parts. The first part examines what community laws the Court empowers with the supremacy principle. The second part explores what national laws the Court subjects to the supremacy principle.

a. Community law with supremacy²⁷⁷

In 1969, following *Costa*, the Court reaffirmed the supremacy principle's blanket application to primary law in the *Willhelm* decision.²⁷⁸ It reaffirmed *Willhelm* in 1989 in the *Zuckerfabrik* cases.²⁷⁹ Today, all of the Union's primary law can subsume national law by applying the supremacy doctrine.

In *Willhelm*, the Court utilized the *sine qua non* premise of *Costa* to open the door for the Court to define the supremacy doctrine's application to secondary legislation. *Willhelm*'s language focused on the divide between laws with direct effect and laws without direct effect rather than between primary and secondary law.

The Court applied the supremacy principle to secondary legislation in 1972 in *Marimex*,²⁸⁰ and then again a year later in *Politi*.²⁸¹ In these cases, the Court ruled that

²⁷⁷ Community law is separated into primary law (the treaties), secondary law (regulations, directives, decisions and opinions), and general principles that emanate from them. See Chapter I. p 22 for their distinguishing features.

²⁷⁸ Case 14/68 *Walt Wilhelm* [1969] ECR I

²⁷⁹ Case C-143/88 and C-92/89 *Zuckerfabrik Südreithmarschen AG v Hauptzollamt Itzehoe* and *Zuckerfabrik Soest GmbH v Hauptzollamt* [1989];

²⁸⁰ Case 84/71 *Marimex v. Italian Ministry of Finance* [1972] ECR 89

²⁸¹ Case 43/71 *Politi s.a.s v. Ministry for Finance of the Italian Republic* [1971] ECR 1039

community regulations must also have the force of supreme law so that the community's legislative organs can be effective.²⁸² The Court then applied this supremacy to certain decisions made by the European Commission in 1979 in the *Salumificio* case.²⁸³ These cases all dealt with the supremacy of regulations.

In 1975 the Court applied the supremacy doctrine to the international agreements made by the Union's organs through secondary law.²⁸⁴ Since then, international agreements made by the Union have maintained an unlimited supremacy over similar agreements made by states.

In 1981, the Court limited the scope of directives that can apply the supremacy doctrine.²⁸⁵ In *Rewe-Handelsgesellschaft* the Court applied the direct effect's ECtHR-glossed "unconditional and sufficiently precise" test to determine if a directive can apply the supremacy doctrine.²⁸⁶ This limitation is marginal, however, and the Court retains its sole ability to change how courts interpret directives.²⁸⁷ In the 1980's and 1990's the Court further limited the supremacy doctrine's application to directives that implicitly claim direct effect.²⁸⁸ In the early 1990's the Court limited state liability under supreme directives.²⁸⁹

²⁸² *Politi*, at para 9.

²⁸³ Decisions must be based on implementing directly effective regulations. See: Case 130/78 *Salumificio di Cornuad SpA v Amministrazione delle Finanze dello Stato* [1979] ECR 867

²⁸⁴ Case 38/75 *Douaneagent der NV Nederlandse Spoorwegen v Inspecteur der invoerrechten en accijnzen* [1975] ECR 1439 at para 13

²⁸⁵ Cases arising from directives generally only come out of instances where a state does not comply with a directive and attempts to rely on national law that conflict with its directive obligations against an individual. The directives at issue therefore require vertical direct effect. Nearly all the following cases are about labor, labeling, taxes, or safety code practices: Case 158/80 *Rewe-Handelsgesellschaft Nord mbH et Rewe-Markt Steffen v Hauptzollamt Kiel* [1981] ECR 1805; Case 8/81 *Ursula Becker v Finanzamt Münster-Innenstadt* [1982] ECR 53

²⁸⁶ Again, the Court allowed national courts to apply tests to determine whether a secondary provision is precise and unconditional enough to require supremacy over national laws. See Chapter III p. 95-96, Chapter I, p. 22

²⁸⁷ Case 158/80 *Rewe-Handelsgesellschaft Nord mbH et Rewe-Markt Steffen v Hauptzollamt Kiel* [1981] ECR 1805; Case 14/83 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891, para 1

²⁸⁸ Case 14/83 *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen* [1984] ECR 1891, para 1; Case C-6/90 and 9/90 *Andrea Francovich and Danila Bonifaci and other v Italian Republic* [1991] ECR I-5357 para 9. Case C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Federal Republic of Germany and The Queen (of the United Kingdom) v Secretary of State for Transport, ex parte Factortame Ltd, and Others* [1996] ECR I-1029 at para 4

²⁸⁹ Case C-287/98 *Grand Duchy of Luxembourg v Berthe Linster, Aloyse Linster and Yvone Linster* [2000] ECR I-6917 at para 30; Case 34/67 *Firma Gebrüder Lück v Hauptzollamt Köln* [1968] ECR 245; Case 106/77

The Court in *Wachauf* applied the supremacy doctrine to the treaties' general intent and purposes.²⁹⁰ National governments may not rely on any national or community law that may in any way oppose rights intended by the treaties.²⁹¹ The Court has generally avoided establishing this area further due to its inherent vagary.

The Court has applied the supremacy doctrine to almost all forms of community law. The only areas that the Court hasn't fully applied the doctrine are to community provisions that are vague or have ambiguous intent. In its application to community law, the Court has reaffirmed the presupposition that community law without the supremacy law cannot feasibly function. Through this application, therefore, the Court communicates its belief that community law's substance exists above national law's substance in a monist legal framework.

b. Member state law subject to supremacy

Unless a community law specifically states it is not supreme, the Court has found that any and all forms of pre-existing national law are subject to the supremacy doctrine. The Court has allowed little leeway in this matter.

Amministrazione delle Finanze dello Stato v Simmenthal SpA [1978] ECR 629 (“*Simmenthal I*”); Case 103/88 *Fratelli Cotozzani SpA v Comune di Milano* [1989] ECR 1861; Case C-46/93 and C-48/93 *Brasserie du Pêcheur SA v Federal Republic of Germany* and *The Queen (of the United Kingdom) v Secretary of State for Transport, ex parte Factortame Ltd, and Others* [1996] ECR I-1029; Case C-10/97 to C-22/97 *Ministero delle Finanze v IN.CO.GE. '90 Srl, and others* [1998] ECR I-6307 para 27-28; see generally, Kaczorowska pp 324-6

²⁹⁰ Case 5/88 *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft* [1989] ECR

²⁹¹ *Ibid.* at para 2.

In 1968 the Court determined that any member state law or action is subject to supremacy principle. In *Firma Gebrüder Lück v Hauptzollamt Köln*,²⁹² the German state argued that community law was meant to protect the functioning of national constitutional laws, and thus ought to yield to certain fundamental, structural principles of national Constitutions.²⁹³ However, the Court concluded that the potential future damage to the protection of all Europeans' fundamental rights outweighs any actual damage to a handful of German importer/exporters' "freedom of action and disposition" under German constitutional law.²⁹⁴ The Court ruled against the German state, and subjected any national law to the supremacy doctrine.

Since 1968, the Court has only expanded the obligations that the supremacy doctrine imposes on states.

In 1974, the Court determined in *Commission v. French Republic* that if the community passes a law, any pre-existing national laws must change to reflect it.²⁹⁵ If a government does not change a law which parallels the community law, it can't legally apply the national law. The obligation to update national law to reflect community law applies even after the Court determines a community law procedurally inapplicable.²⁹⁶ At the turn of the millennium, the Court reaffirmed *Commission v. French Republic*'s 'obligation-to-update.'

In 2000, the Court applied the supremacy doctrine to some national laws which are consistent with community law in substance but inconsistent in procedure. For example: the legitimate expropriation of land by a national legislative process that did not include a required

²⁹² Case 34/67 *Firma Gebrüder Lück v Hauptzollamt Köln* [1968] ECR 245; Reaffirmed in Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR 629 ("*Simmenthal I*");

²⁹³ *ibid.* para 2

²⁹⁴ *Ibid.* para 2, 3, 18, 20.

²⁹⁵ Case 167/73 *Commission of the European Communities v. French Republic* [1974] Para 40

²⁹⁶ *Ibid.* para 41-42

‘consent procedure’ was subject to the supremacy doctrine’s application.²⁹⁷ Since only community law with direct effect can affect a national legislative process, national courts have a little interpretive leeway in this matter.²⁹⁸

In the recent past, the Court slightly limited the extent of national judicial rulings that yield to community rulings. In 2006, in *Kapferer*, the Court ruled that a case with *res judicata*²⁹⁹ on the national level cannot be retried at the behest any community law.³⁰⁰ The Court justifies this limitation fairly simply: *res judicata* is an important concept to the functioning of both the community and national jurisdiction and therefore must be respected by both.

The Court doesn’t care where national law comes from. When the Court applied the supremacy doctrine to the German human rights code, it explicitly stated that all national law is subordinate to directly effective community law. In not limiting the doctrine’s application, the Court affirmed and institutionalized the supremacy doctrine’s meaning as a substantive promotion of the community’s legal authority.

IV. Conclusions: the supremacy doctrine

The Court has reaffirmed and institutionalized its initial definition of the supremacy doctrine. The Court initially defined the doctrine to mean the substantive subordination of national law to community law. The community is allowed to wield the doctrine while the states

²⁹⁷ See Case C-287/98 *Grand Duchy of Luxembourg v Berthe Linster, Aloyse Linster and Yvone Linster* [2000] ECR I-6917

²⁹⁸ Though the Court in *Berthe* made overtures toward nullifying this distinction and applying supremacy to all national procedural law. See: *ibid.* at para 32

²⁹⁹ “A thing completed” meaning the case has been dismissed, decided, or closed in national jurisdictions.

³⁰⁰ Case C-234/04 *Rosmarie Kapferer v Schlank & Schick GmbH* [2006] ECR I-2585 para 20-21; via Case C-453/00 *Kühne & Heitz NV v Produktschap voor Pluimvee en Eieren* [2004] ECR I-837 para 26

cannot. Thus, the Court has asserted final legal authority within the Community's discretion by applying the supremacy doctrine.

Therefore, the Court has used the supremacy doctrine to fundamentally assert a conception of the European legal structure as monist in the areas where the Court has competence.

C. Conclusions: the ECJ's jurisprudence

The Court uses the direct effect and supremacy doctrines to establish itself procedurally and substantively above national jurisdictions. By applying the direct effect doctrine, the Court co-opts national court's jurisdictions to apply community law before national law. By applying the supremacy doctrine, the Court subverts the efficacy of national law in relation to community law. The Court uses these two doctrines to subvert and co-opt national jurisdictions in the areas of the Court's competence.

The Court's usage of these two doctrines reflected its fundamental conception of the European legal order, and its role within it. First, the Court perceives that in a narrow band of law there exists a monist legal framework at whose head its jurisdiction stands. Second, the Court perceives that this narrow band of law is defined by Community, not state, processes. Third, in these areas, the Court has actively subordinated national courts to itself. This activity implies the courts' willingness to undermine its member states authority and assert its supranational position. Fourth, the Court recognized its role in relation to the ECtHR by applying doctrines developed in the ECtHR's jurisprudence to its own doctrines when it can.

Therefore, the Court in its functioning has constructed its purpose in the European region as an active supranational court that fundamentally undermines other jurisdictions for its own

efficacy. The Court has asserted this self-identification in a narrow area of law, which it perceives is contracted to it by member states through the Union's constitutional procedure

ii. What it is: the Court's constitutive *telos*

In 1977 the European Council, Commission, and Parliament made a joint declaration that stressed the importance of the protection of fundamental rights as stated in the ECHR and in Member State Constitutions. This declaration established the protections of fundamental rights as valuable objectives for the Community as a whole.³⁰¹ In 1989 the Parliament, during the preparation of the Maastricht Treaty, released a declaration and a resolution that proposed the creation of a draft Charter of fundamental rights and Freedoms.³⁰² The proposal languished until 1999.

On 3-4 June 1999, The European Council met in Cologne to consider major issues facing the Union after the Amsterdam treaty entered into force. During their discussion, the Heads of State of the 15 European Union member states decided that, “the fundamental rights applicable at Union level should be consolidated in a Charter and thereby made more evident.”³⁰³ On 15-16 October 1999, the European Council met again in Tampere. The Tampere Council clarified the composition, process, and logistics of an intergovernmental convention (the “Convention”) whose purpose was to draft an EU Charter of Fundamental Rights.

The IGC comprised members from the national governments, national parliaments, the European Commission, and the European Parliament. Observers attended the deliberations from the Court of Justice, the Council of Europe, and the European Court of Human Rights. The

³⁰¹ European Parliament, Council Commission. *Joint Declaration of 05.04.1977 by the European Parliament, the Council and the Commission*. OJ C 103 of 27.04.1977, p 1. Accessed from http://www.europarl.europa.eu/charter/docs/text3_en.htm on 18 November 2009

³⁰² European Parliament. *Resolution adopting the Declaration of fundamental rights and freedoms of 12.04.1989* (A2-3/89, OJ C 120 of 16.05.1989). and *Resolution on the Community Charter of Fundamental Social Rights of 22.11.1989* (A3-69/89, OJ C 323 of 27.12.1989)

³⁰³ European Community. “Presidency Conclusions - Cologne European Council (3 and 4 June 1999)” (Brussels: Council of the European Union, 23 March 2005). SN 150/99. Accessed last 24 April 2010 at http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/83201.pdf.

deliberative process was fully transparent; during the deliberations all working documents were made public. The Economic and Social Committee of the European Parliament, the Committee of the Regions (local representative organ in the European Parliament), the Ombudsman of the Union; and social, corporate, and policy non-governmental organizations were invited to contribute their opinions.

In 2000, member state representatives, member state parliamentary representatives, and Union delegates perceived a need to make individual rights more visible in the expanding European Union. They believed that a legal document would accomplish this best.³⁰⁴ These perceptions might have been caused by a growing internal interest in presenting a strong identity to the rest of the world. Or, these perceptions might have been caused by an internal desire to accelerate the expansion of individual rights within the Union. Regardless of how their perceptions were motivated, European actors approached the IGC with an internal consensus that enacting a new, expanded set of regional individual rights was a worthy undertaking. The deliberations of the Convention were not over whether to make a Charter, but what to make the Charter into.³⁰⁵

After its IGC creation, the Charter of Fundamental Rights was packaged with the Constitutional Treaty. Member state governments and the European population roundly rejected the Constitutional Treaty and the Charter in 2004 referenda. After a three year ‘period of reflection’, the Charter was included in the Lisbon Treaty of 2007. In December 2009, the

³⁰⁴ Though the EU organs are apparently looking for more ways than just the legalization of rights to promote awareness—in December 2010 the Charter may well become an 80-minute, multimedia, epic poem in English. See, <http://fra.europa.eu/fraWebsite/attachments/FRA-Negotiated-Procedure-02032010.pdf> Accessed last 23 April 2010.

³⁰⁵ Badinter, Robert. “Une Charte européenne, oui, mais laquelle?” in *Le Monde* 20 June 2000, p. 1. Accessed last 23 April 2010 at http://www.ena.lu/european_charter_yes_kind_monde_20_june_2000-2-18320; and The European Parliament. “What Form of Constitution for the European Union: Strategies and options to reinforce the constitutional nature of the Treaties” (Luxembourg: European Parliament, 1999). Accessed last 24 April 2010 at http://www.europarl.europa.eu/charter/docs/pdf/poli105a_en.pdf

Lisbon Treaty finally passed an Irish referendum that had yet again threatened to delay the Charters' inclusion and enforcement indefinitely. Now, the Charter is a formal part of the European Union's treaty law and is judicable by the European Court of Justice. The Court's constitutive *telos* was therefore fundamentally re-defined by individuals, member state delegates, Union representatives, and NGO advocates in the IGC of 1999-2000.

This section looks at the available material about the Charter's creation in the 1999-2000 Intergovernmental Convention³⁰⁶ to show how actors externally perceived the role of the ECJ in the European regional legal structures. It conducts an analysis of the non-state contributions, and relates these contributions to the IGC's justifications of the Charter's provisions.

This section is divided into two subsections. The first subsection surveys the preparatory work, the composition, and the symbols that were used in the Intergovernmental Convention to discuss the Charter's concepts. The second subsection identifies how non-state actors and the Convention generally and finally perceived European individual rights and the regional role of the ECJ.

This section establishes that more actors perceive themselves to hold agency to redefine the ECJ than the ECtHR. While communicating their interests and regional identities, these actors recognized an internal consensus by agreeing over the normative definitions of the EU's legal structure, socio-economic rights, and the relationship of regional institutions. Actors agreed that the Charter would be judicable by the ECJ. They agreed that socio-economic rights were fundamental individual rights. And participants agreed that the region can handle the existence of two human rights courts.

³⁰⁶ Which titled itself the "European Convention." A name which, for clarity's sake I will avoid due to its similarity to the "European Council", the "European Commission", etc. which I think are confusing enough as it is. I will use the names "the Convention" or "the IGC" to describe the body that created the Charter of Fundamental Rights.

The IGC therefore expanded the Court's competences to reflect expanding concepts of fundamental rights under the assumption that the ECJ jurisdiction will co-operate with the ECtHR. This fundamentally redefines the Court from its functional *telos* by potentially undermining the established monist hierarchy that the Court had developed since *Van Gend en Loos*.

A. Preparatory work

The Tampere European Council meeting instructed the Chairperson of the IGC, Roman Herzog, to perform the appropriate preparatory work in association with his Vice-Chairpersons. The Vice-chairs were Antonio Vitorino (the Italian European Commission delegate), Iñigo Méndez de Vigo (the Spanish European Parliament delegate), and Loukas Apostolidis (the Greek national parliamentary delegate). These individuals invited the various actors to submit opinions and/or attend the IGC in Brussels. The Convention began its work in December 1999.

This subsection first outlines the actors who attempted to affect the development of the Charter and their relationships. Then, it surveys the source material used for the Charter. The subsection finally outlines the symbols that delegates used to communicate ideas and to coerce others.

i. Actors

The Intergovernmental Convention was attended by 113 individuals who represented the European Parliament, the European Commission, national parliaments, and national

governments.³⁰⁷ It was observed by 12 individuals from the European Court of Justice, the Committee of the Regions, the Economic and Social Committee, the Ombudsman, the Council of Europe, and the European Court of Human Rights. Social non-governmental organizations, corporations, Unions, legal experts, and many more actors were invited to submit written recommendations to the Convention. These opinions were included in each individual delegate's dossier.

The IGC's actors generally operated on the regional or domestic level. More often than not, delegates had to operate on both levels. Delegates from the Union organs likely had working relationships with one another. Although national parliamentary members likely had fewer relationships with the other delegates, they likely knew of each other generally. Other than residing and working in the European Union, the IGC's delegates had no common platform that connected them. This contrasts the European Movement party that connected almost every delegate at the Council of Europe's deliberations over the ECHR.³⁰⁸

The leader of the Convention, and its primary spokesperson, was the former German Bundespräsident President Roman Herzog.³⁰⁹ Trained as a professor of law, Roman Herzog is a German lawyer, parliamentarian, judge, and Christian-Democrat (center-right) politician from

³⁰⁷ European Parliament "Members of the Convention responsible for drafting the Charter of fundamental rights (1999-2000)" (Brussels: European Parliament, 2005). Accessed last 24 April 2010 at http://www.europarl.eu.int/charter/composition_en.htm.

³⁰⁸ See Chapter II pp 41-43

³⁰⁹ "Roman Herzog über seine Arbeit in einer EU-Kommission- 'Keine Debatte über Verfassung'" *Die Welt*. 12 February 2000, p 6. Accessed last 23 April 2010 at http://www.ena.lu/interview_roman_herzog_welt_12_february_2000-2-18315.

N.B. The Bundespräsident is the federally elected leader of the Bundestag. S/he is elected to a five-year term by delegations from each Land (the German equivalent of the American state), and is the German ceremonial Head of State. The president operates under the authority of the Bundestag which is led by the Chancellor (currently: Angela Merkel).

Landshut, Germany. He was president of the German republic from 1994-1999.³¹⁰ He retired after leading the Charter of Fundamental Rights' development Convention.

ii. *Source material*

The Convention based the Charter of Fundamental Rights' provisions on the United Nations' UDHR, the European Convention on Human Rights, the European Social Charters, the ECtHR and the ECJ's jurisprudence, and the constitutions of the EU's member states.³¹¹

Delegates primarily relied on the founding Treaties of the European Community and the ECJ's jurisprudence to build the Charter. Since the Charter was to be included in the Union's primary law, and would be enforced by the ECJ, these facts are unsurprising.

Delegates also heavily relied on the ECHR in the drafting process. The final draft Charter often quotes the ECHR word for word in provisions pertaining to basic individual rights, certain family rights, political rights, and judicial rights.³¹² At times the IGC modernized the ECHR's language, but retained their same meaning— for instance in educational, cultural, and certain family rights.³¹³ In some family rights' provisions the only language change between the ECHR and the Charter was the promotion of gender equality through a modern set of pronouns. The delegates used the UDHR only in the Charter's first Article.

In the area of socio-economic rights,³¹⁴ participants used the Council of Europe's European Social Charter,³¹⁵ the Community Charter of the Fundamental Social Rights of

³¹⁰ The European Council. "Roman Herzog: biography" Accessed last 23 April 2010 at http://www.ena.lu/biography_roman_herzog

³¹¹ *Draft Charter of Fundamental Rights: Note from the Praesidium*. (Brussels: 11 October 2000). Accessed at: http://www.europarl.europa.eu/charter/pdf/04473_en.pdf on 23 March 2010.

³¹² See Charter articles: 1, 2, 4, 5, 6, 7, 10, 14, 28, 48, 49, and 50.

³¹³ See Charter articles: 8, 9, 11, 12, 17, 19, 47, and 52.

³¹⁴ See Charter articles: 15, 16, 17, 23, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, and 38

Workers (or the Charter of Fundamental Social Rights),³¹⁶ and the secondary law of the European Union to fashion the Charter. These sources are less authoritative than the ECHR. The European Social Charter is only partially binding³¹⁷ while the Charter of Fundamental Social Rights is only declaratory.³¹⁸ The secondary law of the European Union is legally enforceable, and thus holds a stronger legal basis. However, the EU's secondary law lacks the visibility and moral legitimacy of the Social Charters.

The IGC therefore had a wider set of international sources from which to draw the Charter than the Council of Europe. This is also unsurprising as there are over four decades of international treaty-making in between the 1999-2000 IGC and the Council of Europe's 1950-1951 meetings.³¹⁹

iii. The symbols

During the Convention, participants communicated about the value of a treaty provision by relating its language to the relationships between pre-existing European institutions, ideas of legitimacy, the visibility of individual rights, and the normative values common to democracies.

³¹⁵ *European Social Charter (revised)*. (Strasbourg: 3 May 1996). Accessed last on 24 March 2010 at: http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/TreatiesIndex_en.asp A general overview provided by the Council of Europe is available at:

http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/PresentationIndex_en.asp. Accessed last on 24 March 2010.

³¹⁶ *The Community Charter of Fundamental Social Rights of Workers* (Brussels: 9 December 1989) Accessed last at <http://www.aedh.eu/The-Community-Charter-of.html>. on 24 March 2010. A legislative summary made by the Commission can be found at

http://europa.eu/legislation_summaries/human_rights/fundamental_rights_within_european_union/c10107_en.htm. Accessed last on 24 March 2010.

³¹⁷ Only 7 of 20 articles of the Social Charter are considered to create international obligations on signatory states.

³¹⁸ Article 27 of the *Community Charter of Fundamental Social Rights of Workers*.

³¹⁹ See Chapter II pp 43-45

The major questions facing the Convention officials were: 1) what is the relationship of this charter to the ECHR? 2) What rights are fundamental and how are they defined? And 3) what mechanism best protects fundamental individual rights?

When representatives addressed the question of the Charter's relationship to the ECHR, they used arguments that portrayed the Charter as either equivalent or stronger than the ECHR. However, the representatives consistently assumed that any Charter should not detract from the ECHR's protections, but expand them. The delegates also used language that reflected the ECtHR's and the ECJ's inherent institutional separation.

When delegates addressed the substantive questions of what rights to include, and what extent to include rights they assumed that the whole of the ECHR would be included. Delegates used arguments over the normative value of expanding the scope or number of the ECHR's rights. By invoking the secondary source of the ECHR, delegates justified their values by connecting them to a socially legitimated external source.

When addressing the Charter's substance discussants also relied on commonly held normative values to justify their arguments. These values are: promoting European cultural diversity, European regional integration, individual rights' visibility, democratic principles, updating the rights of the ECHR, updating the rights of the UDHR, updating the rights in the European Union treaties, updating the rights of other international treaties, principles of legitimate authority, and finally the intelligibility of the ECJ and the ECtHR's jurisdictional boundaries. These values on the whole primarily use language of value-added processes—updating rights, promoting diversity, promulgating individual rights. The exception in these symbols' language is the intelligibility of the ECJ and ECtHR's jurisdictional boundaries, which

inherently promotes the identifiable separation of its subjects. This will be shown to reflect how the regional courts' jurisdictions were used in argument.

For the most part, when delegates addressed the enforcement mechanism of the draft Charter, they assumed the Charter would be legal. Some outliers argued against a legally binding treaty using the potential overlapping jurisdictions of an ECJ-enforced Charter and the ECtHR as their justification. However these arguments were either marginalized or ignored by other actors. The language of the symbol therefore reflects the usage of the symbol. Both were negative and both were ignored. This will be shown more concretely below.

B. The deliberations

The deliberations of the Intergovernmental Convention were groundbreaking in their transparency. Publishing working documents on the internet as they were created and used, the Convention used new information technology to legitimize the creation of the Charter by revealing all of its mundane and boring details. Unfortunately, because these details were mundane and boring, they are no longer kept on the European Union's servers. The only exceptions are the various NGO contributions prior to the Convention's meeting, commentaries by the chairpersons, explanations of the provisions by the Convention, a plethora of links to the Charter's source material, and a maddening labyrinth of links between bureaucracies that, though they all refer to the location of the Conventions' working papers, functionally lead nowhere.³²⁰

However, since there do exist a good deal of non-state contributions to the Convention, one can identify how non-state actors' identity- and interest-formation process functioned during

³²⁰ My November-December 2009 emails to the Parliamentary offices that govern public access to EU documents, which request access to this information, haven't been replied to in any form, though the addresses are correct in multiple web locations.

the IGC. And although these contributions won't necessarily reflect how the most influential participants from the EU and the member states processed information during interactions inside the Convention, it can identify some general social trends that surrounded the Convention. These general trends can inform our understanding of the European social realities that surrounded the Charter's creation.

This section is divided into two subsections. The first conducts a statistical analysis of 50 of the non-state contributions to the Intergovernmental Convention that drafted and finalized the Charter of Fundamental Rights.³²¹ It correlates the symbols that an actor used to its argumentative intent to identify who used what symbol in what way. The second subsection relates these correlations to the Conventions' explanations of the final draft Charter.³²²

The first subsection finds that dissent over the Charter's fundamental features was generally ignored. While corporate entities consistently invoked the need to keep the ECJ's and the ECtHR's jurisdictional boundaries intelligible as an argument against a legally binding charter, social NGO's, individuals, and unions consistently invoked the normative value of increasing rights' visibility and expanding pre-existing treaties to promote the inclusion of certain socio-economic rights.

The second subsection finds that the Convention justified the Charter's provisions by aligning them to pre-legitimated, European institutions. It aligned the Charter's enforcement mechanism with an internal perception of the European developmental process that had been taken for granted by external contributors.

³²¹ A sample of a third of the total contributions. This sample is drawn with the intent of capturing the range of actors (individual, NGO, union, businesses) and follows particularly those who express opinions about socio-economic rights and legal enforceability.

³²² *Draft Charter of Fundamental Rights: Note from the Praesidium*. (Brussels: 11 October 2000). Accessed last 25 April 2010 at: http://www.europarl.europa.eu/charter/pdf/04473_en.pdf

i. *Deliberative consensus*

I. Non-state contributions

Unlike the deliberations in the Council of Europe, the Charter's Intergovernmental Convention did not take the pre-existing consensus for granted. While conflict did occur within and around the Convention, the conflict was over marginal issues of provisions' wording. The fundamental structure of the Charter was accepted from the outset by all but a few participants. Although these few challenged the others, their arguments were mostly written off and ignored. When a few contributors did respond to these dissidents, they either dismantled the dissents' arguments and then engaged the majority or engaged the majority and addressed the dissent as a side thought. How these contributors interact with the dissent show that the IGC's actors generally agreed on the basic structure of the Charter. This basic structure then reflects their construction of the Court's identity.

This subsection presents a statistical analysis of 50 non-state contributions.³²³ The dataset for the analysis comes from the Parliament's public databases and was analyzed using Microsoft Excel and SPSS.³²⁴ The analysis codes non-state contributions based on the nature of the actor, the number and types of proposals these actors made, whether or not the contribution regards socio-economic rights or the legal enforcement of the Charter, and the symbols or justificatory logics that the contributions employed in their arguments. It then correlates these variables and identifies areas of significance. (Data, See Diagram 9)

This analysis codes data first by what type of actor produced the contribution. It finds five categories of actors: Individuals, social NGO's, Unions, and Businesses. Examples of actors in these categories are (respectively) university professors, the Association of Southern-

³²³ European Parliament. "Contributions forwarded to the Convention" Accessed last 24 April 2010
http://www.europarl.europa.eu/charter/civil/civil0_en.htm

³²⁴ Ibid.

European Women (Association des Femmes De L'Europe Méridionale), the Media Industrial Union (Industriegewerkschaft Medien), and the Bass Hotels & Resorts (Bass PLC). NGO's contributed most often to the Convention, submitting 37 contributions. (See Diagram 10)

The actors' contributions are then coded by number and type of proposals made. The 50 actors made 147 proposals in two categories: substance and process. 102 proposals related to the substance of the Charter's rights, and 45 related to the Convention process. (See Diagram 11)

The analysis then codes the substantive proposals based on whether the actor argued for or against a legal Charter (17 for, 3 against; see Diagram 12) and whether the proposals argued for the inclusion or exclusion of socio-economic rights (14 for, 2 against; see Diagram 13).

The analysis then codes contributions based on the socially constructed symbols they employ to justify their substantive arguments.³²⁵ These symbols are European cultural diversity, European regional integration, individual rights' visibility, democratic principles, updating the ECHR, updating the UDHR, updating European Union treaties, updating other international treaties, principles of legitimate authority, and finally the overlap of the ECtHR's and the ECJ's jurisdictions. The study finds that contributors invoked these symbols 82 times in 130 different logical arguments on the substance of individual rights. (See Diagram 14, 15) The number of symbols, arguments, and proposals differ from each other because often contributors used a single symbol to make multiple arguments that resulted in multiple proposals.

The findings of the data analysis show that NGO's used arguments of visibility significantly more often than other actors (See Diagram 16).³²⁶ Businesses used the symbol of an ECJ-ECtHR jurisdiction dispute as a legitimate argument more often than other non-state actors.

³²⁵ When participants communicated about the Convention process as a whole they invoked procedural rather than substantive symbols. The primary procedural symbol used in non-state contributions was the normative value of a transparent Convention. This study does not analyze procedural arguments as participants typically made them tangentially to substantive arguments.

³²⁶ Significant at < 0.05 level (2-tailed)

However, this finding is ambiguous due to the low frequency (5) of the symbol's usage (See Diagram 17). Actors who argued using the symbol of European integration were more likely to also use democratic principles, and the expansion of the ECHR's rights as justifications for their arguments. (See Diagram 18)³²⁷

These data show that non-state actors did not consider the potential overlap of the ECJ and the ECtHR to be problematic. Instead, they discussed the substance of rights using other common concepts to make their points. When a non-state actor did employ these two institutions' overlapping jurisdictions as a reason to make the Charter non-legal, other non-state actors either negated it or didn't reply. Non-state actors therefore generally agreed that the enforcement mechanism of the Charter should be legal, and should include some set of socio-economic rights. The questions addressed by non-state actors were questions of the charter's wording, not its structure.

³²⁷ The correlations of these variables are each severally significant at < 0.05 level (2-tailed)

Diagram 9. Table for Non-state Actor Contributions

Non-State Actor type	Individual		NGO		Union		Business		Total	
	<i>n</i>	% tot	<i>n</i>	% tot	<i>n</i>	% tot	<i>n</i>	% tot	<i>n</i>	% tot
<i>N</i>	2	4%	37	74%	6	12%	5	10%	50	100%
Total proposals	2	1.36%	117	79.59%	14	9.52%	14	9.52%	147	100%
Proposals re: Substance	2	1.96%	83	81.37%	11	10.78%	6	5.88%	102	100%
Proposals re: Process	0	0%	34	75.56%	3	6.67%	8	17.78%	45	100%
Economic ³²⁸	0	0%	7	50%	5	35.71%	1	7.14%	14	100%
Non-Economic	0	0%	0	0%	0	0%	2	100%	2	100%
Legal Enforcement	2	11.1%	15	83.33%	1	5.56%	0	0%	18	100%
Non-legal Enforcement	0	0%	0	0%	0	0%	2	100%	2	100%
Argumentative Logic										
Cultural Diversity	1	8.3%	9	75%	1	8.3%	1	8.3%	12	100%
Integration	0	0%	7	63.63%	1	14.29%	3	28.58%	11	100%
Visibility	0	0%	13	92.85%	0	0%	1	7.15%	14	100%
ECHR	1	14.29%	5	71.43%	1	20%	0	0%	7	100%
UDHR	0	0%	5	100%	0	0%	0	0%	5	100%
EU jurisprudence	0	0%	4	100%	0	0%	0	0%	4	100%
Other Treaties	0	0%	6	85.71%	0	0%	1	14.29%	7	100%
Democratic Principles	0	0%	6	85.71%	1	14.29%	0	0%	7	100%
Legitimacy	0	0%	7	70%	2	20%	1	10%	10	100%
ECtHR-ECJ jurisdiction ³²⁹	0	0%	1 + 2 -	+20% - 40%	0	0%	2	40%	5	100%

³²⁸ i.e. The Actor advocated for the inclusion of economic rights, such as social security, into the charter's language.

³²⁹ In the documents of the NGOs' two denied the validity of the argument that the jurisdictional conflict between the ECtHR and the ECJ would be detrimental to the European human rights regime, while one accepted it. I identify the NGO's usages as positive or negative here, but analyzed the data as an absolute value (i.e. with a value of 3 rather than -1). Note that one of these negative usages was made by an UN-based NGO, Marangopoulos, which provided full support for the document produced by the AFEM (Association of Women of Southern Europe). I think technically it is a repetition of the argument, but it seems weaker than a restatement.

Diagram 10. Contributions by Actor

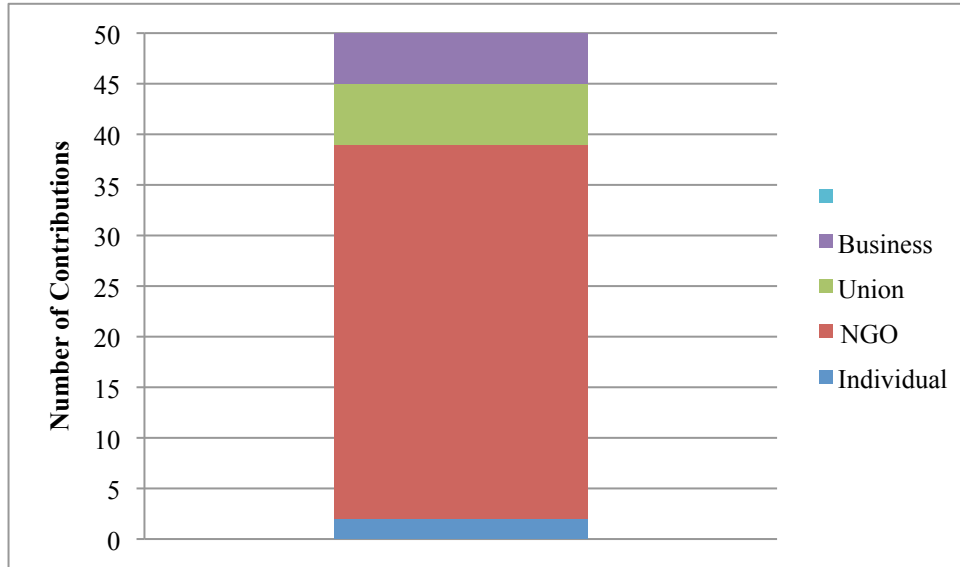


Diagram 11. Actor Proposals by Category

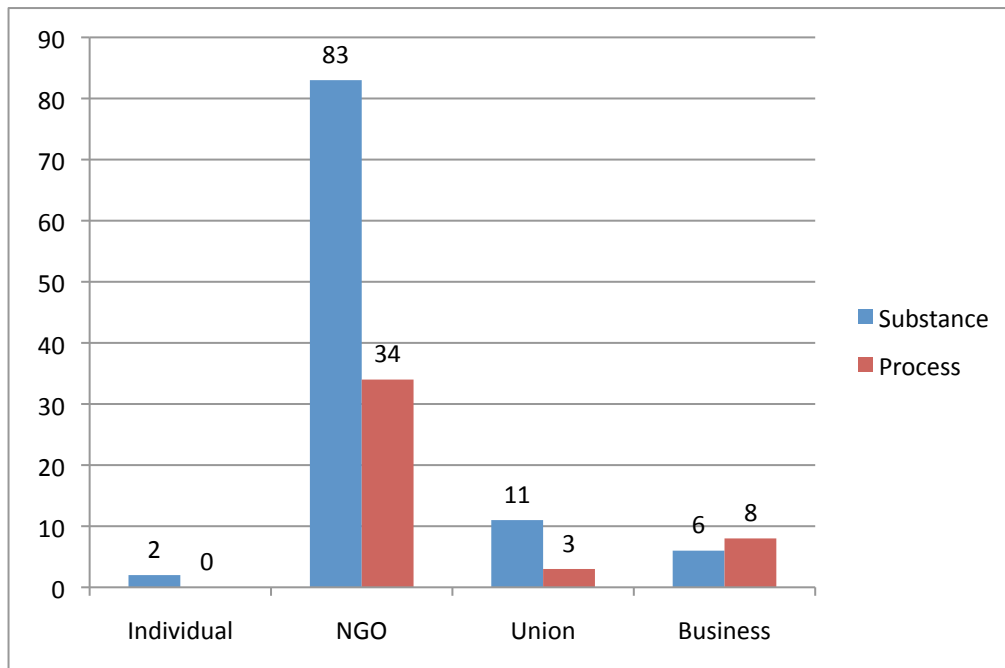


Diagram 12. Substantive Proposals by Actor and Preferred Enforcement Mechanism

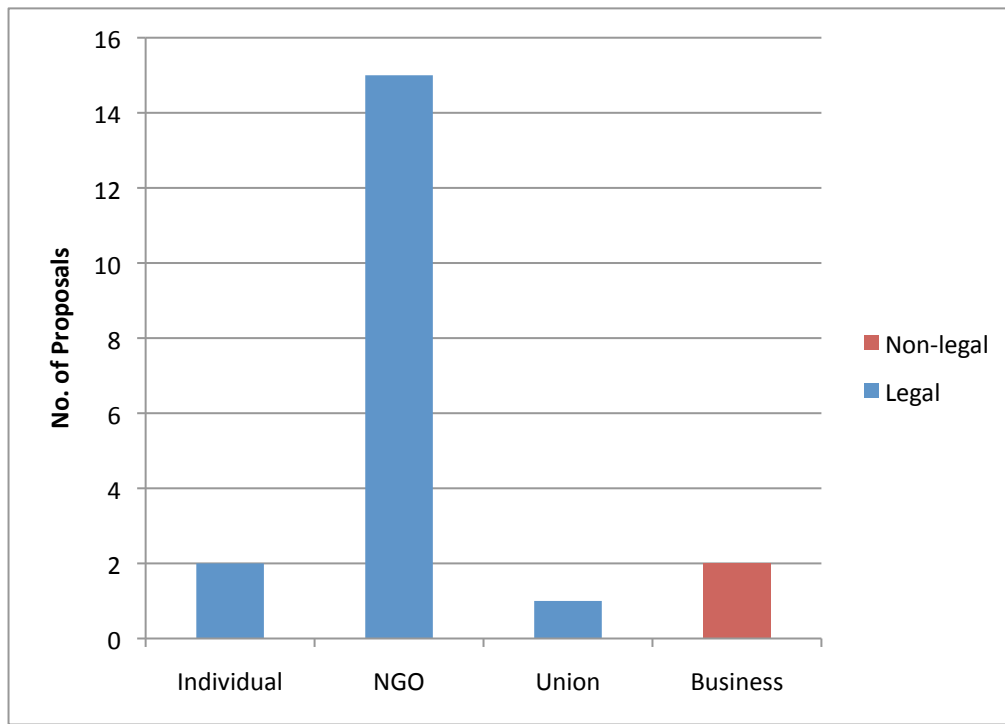


Diagram 13. Substantive Socio-Economic Proposals by Actor

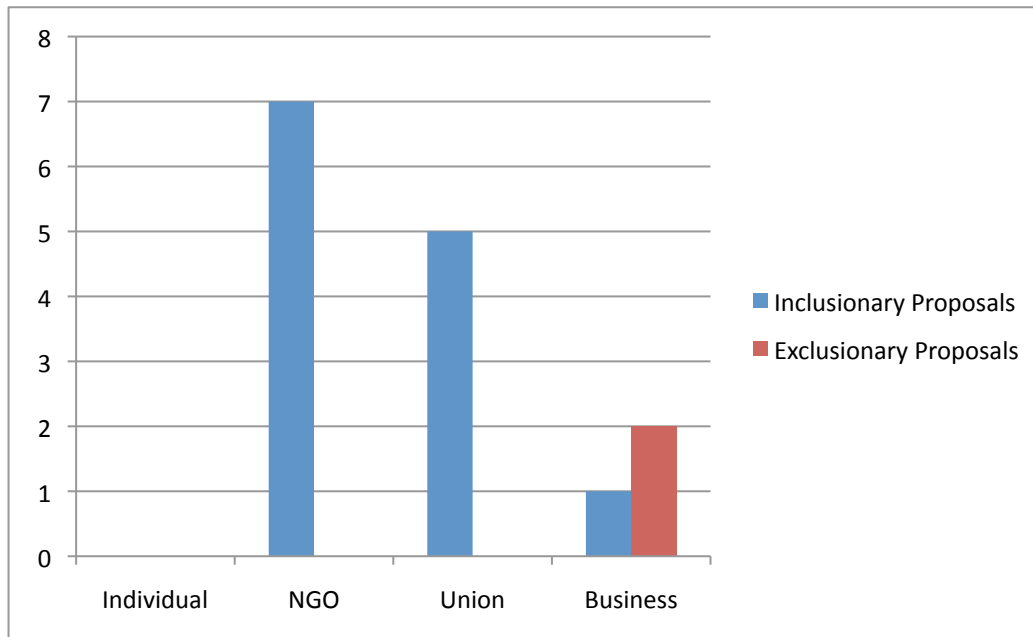


Diagram 14. Actor Symbol Usage

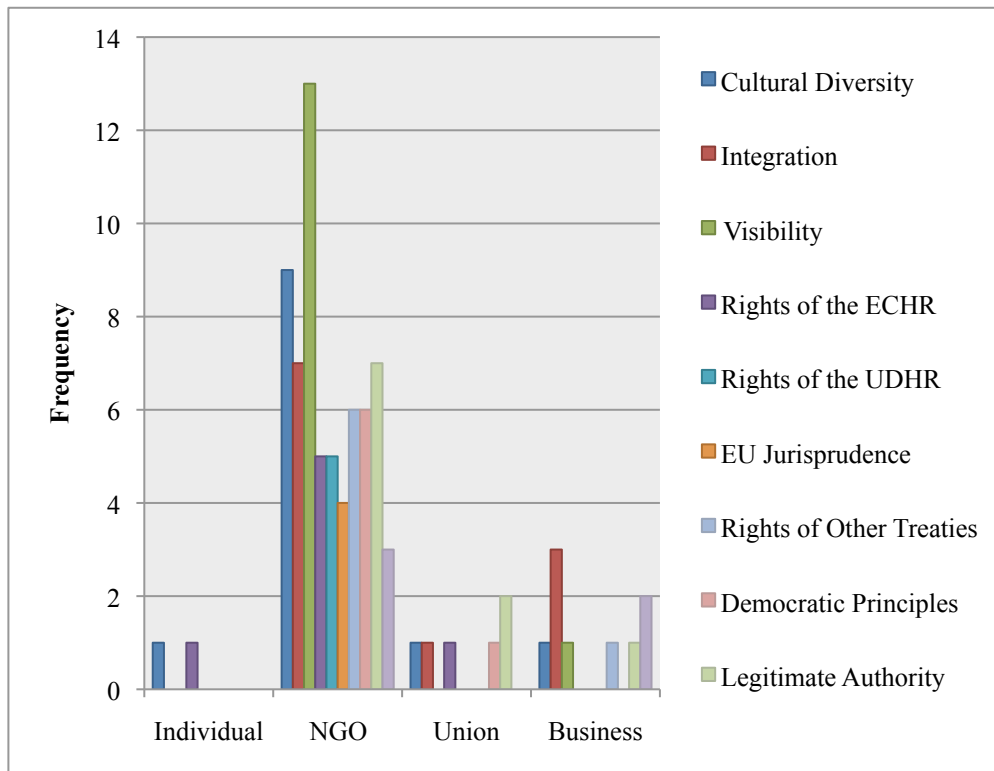


Diagram 15. Actor Symbol Usage Percent

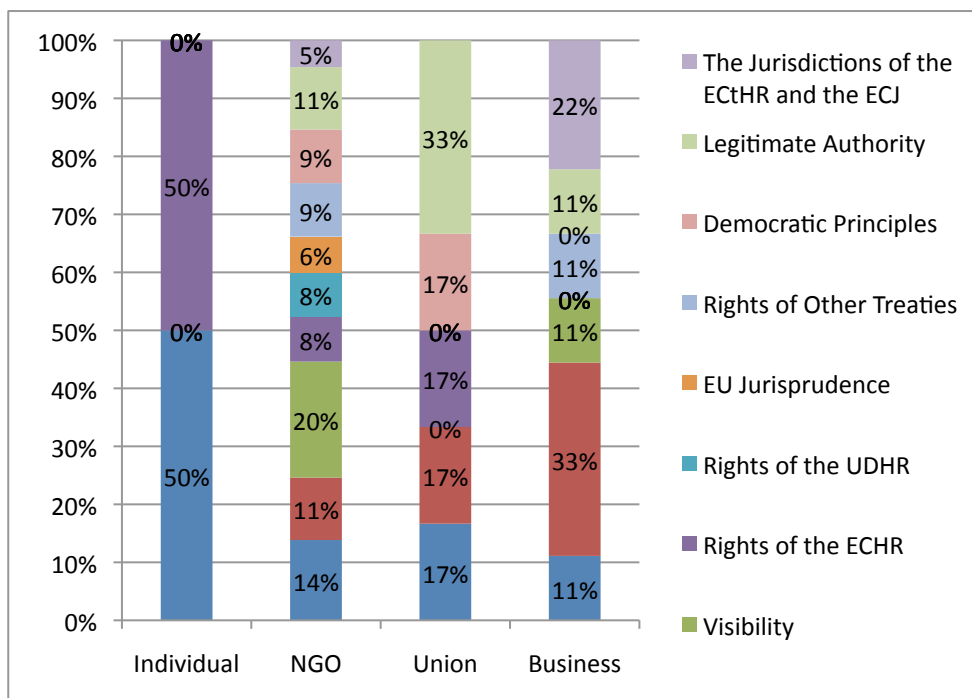


Diagram 16. Correlation between NGO and Visibility Usage

Descriptive Statistics			
	Mean	Std. Deviation	N
ngo	.71	.457	52
Visibility	.27	.448	52

Correlations			
		ngo	Visibility
ngo	Pearson Correlation	1	.327*
	Sig. (2-tailed)		.012
	N	58	58
Visibility	Pearson Correlation	.327*	1
	Sig. (2-tailed)	.012	
	N	58	58

*. Correlation is significant at the 0.05 level (2-tailed).

Diagram 17. Correlation between Business and ECtHR/ECJ's Jurisdiction

Descriptive Statistics			
	Mean	Std. Deviation	N
business	.10	.298	52
ECtHR jurisdiction	.08	.269	52

Correlations			
		business	ECtHR jurisdiction
business	Pearson Correlation	1	.151
	Sig. (2-tailed)		.286
	N	52	52
ECtHR jurisdiction	Pearson Correlation	.151	1
	Sig. (2-tailed)	.286	
	N	52	52

Diagram 18. Correlation between Integration, The Rights of the ECHR, and Democratic Principles

Descriptive Statistics				
	Mean	Std. Deviation	N	
Integration	.23	.469	52	
Update ECHR	.17	.430	52	
Democratic	.13	.345	52	

Correlations				
		Integration	Update ECHR	Democratic
Integration	Pearson Correlation	1	.381**	.289*
	Sig. (2-tailed)		.005	.038
	N	52	52	52
Update ECHR	Pearson Correlation	.381**	1	-.160
	Sig. (2-tailed)	.005		.257
	N	52	52	52
Democratic	Pearson Correlation	.289*	-.160	1
	Sig. (2-tailed)	.038	.257	
	N	52	52	52

** . Correlation is significant at the 0.01 level (2-tailed).

* . Correlation is significant at the 0.05 level (2-tailed).

II. The Conventions' explanations

The fact that non-state actors argued over the wording of the Charter rather than its structure does not prove the existence of the same internal consensus inside the Convention. This subsection shows that this was indeed the case by examining the explanations for the Charter's provisions expressed by the Convention.³³⁰

The Convention's explanations of the Charter's provision utilize symbols that align with the bulk of non-state actors' justificatory arguments. Therefore, the Conventions' justifications for the Charter require similar preconceptions of the European regional political structures, and similar definitions for the symbols that can describe it. The following two sections describe how

³³⁰ *Draft Charter of Fundamental Rights: Note from the Praesidium*. (Brussels: 11 October 2000). Accessed last 25 April 2010 at: http://www.europarl.europa.eu/charter/pdf/04473_en.pdf

the Convention justified the number and scope of its rights and the jurisdictional structure for the ECJ to apply the Charter.

a. Substance of rights

The Convention justified the Charter's provisions by founding them on pre-existing sources. Primarily, the Convention invoked the Union's primary or secondary law as interpreted by the ECJ. Community-based laws are used to justify 76% of the Charter's substantive provisions (38 of 50).³³¹ The Convention supplemented these justifications by referring the Charter's provisions to the ECHR's rights. 36 percent of the Charter's substantive rights provisions are justified in this way (18 of 50).³³² In the area of socio-economic rights, the Convention supplemented Community-law based justifications with either of the European Social Charters.³³³ In a few instances, the Convention also invoked the constitutional traditions of European Union member states or other common international treaties to justify a provision.³³⁴ The convention used the rights of the UDHR once, to justify the first Article.³³⁵

Therefore, the Convention defined the Charter's rights by contextualizing them to the region's pre-existing human rights institutions. By focusing on laws made within the Union and the Council of Europe, the Convention labeled these institutions as the main human rights institutions in Europe. Thus the IGC perceived that the Charter was to expand the European Union as an equal in the field of human rights to the Council of Europe. It therefore assumed that

³³¹ Ibid at Articles: 5, 6, 8, 11, 12, 15, 16, 17, 18, 20, 21, 22, 23, 27, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 50, 51, and 52.

³³² Ibid. at Articles: 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 17, 19, 28, 47, 48, 49, 50 and 52.

³³³ Ibid at Articles: 12, 14, 15, 23, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, and 35.

³³⁴ Ibid at Articles: 3 (Convention on Human Rights and Biomedicine, ICC Statute), 14 (national constitutions), 24 (New York Convention on the Rights of the Child), and 49(national constitutions and the Covenant on Civil and Political Rights).

³³⁵ Ibid at Article 1. "Human dignity is inviolable. It must be respected and protected."

the ECJ would also act as an equal with the ECtHR. This assumption requires the Convention to believe that either both institutions can and will co-operate with each other, or that both institutions can and will find a way to co-operate.

b. Enforcement mechanisms

The IGC's decision to make the Charter legally enforceable reiterates and adds to the Convention's conception of the ECJ as a co-operative court. Articles 51-53 of the Charter deal with the Charter's scope and application in the ECJ.³³⁶ The Convention's explanations of these three articles justify the provisions by invoking the institutional relationships of the ECHR, the EU, and the member states. In doing so, the Convention defines what a proper organization of human rights institutions looks like to the Convention.

First, the Convention establishes that Article 51, "Scope," applies the Charter primarily to actions of the EU institutions and Community law. The Convention sees the Charter as applicable to states only insofar as states act under community law.³³⁷

Second, the IGC's explanation of Articles 52 "Scope of guaranteed rights" permits member state law, the Charter, and the ECHR to protect different collections of rights provided that they all corresponded to the minimum set by the ECHR.³³⁸ Article 52 ties the Charter's protection of human rights to the ECHR's whenever the ECHR has a more protective collection of rights. Therefore when the ECtHR interprets a new right within the ECHR, the ECJ is obligated to do so within the Charter. The Convention justifies this tie as a necessary condition to

³³⁶ Article 54 does as well, but is a word-for-word inclusion of the non-self destructive clause in ECHR Article 17 which disallows rights from being used to cancel out each other.

³³⁷ Ibid. at Article 51, pp. 46-47

³³⁸ Ibid. at Article 52 pp 47-49

provide legal consistency between the Charter and the ECHR where the ECtHR has expanded the ECHR's rights.³³⁹

Third, the Convention establishes that member states may have greater rights' protection than the Charter in Article 53, "Level of protection." The Charter therefore was meant to protect rights common to member states in conjunction with the ECtHR but not in opposition of more expansive national laws.³⁴⁰

c. Synthesis

The Convention therefore conceived that the ECJ would enforce the Charter to protect rights greater than or equal the ECHR and less than or equal to member states' human rights codes. However, the Convention also defined the Charter as unable to contract beyond its initial protection levels.³⁴¹ This required the Convention to conceive of the Charter's regional role in the as a supplement to the ECHR and to member state law.

By not having the Charter replace these institutions, the Convention necessarily believed that all of these institutions could co-exist and protect individual rights together. The Convention, by defining the institutions' relationships explicitly, implicitly believed the regional human rights

³³⁹ See in particular Article 52.3 "Insofar as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

³⁴⁰ Ibid at Article 53 p 49-50

³⁴¹ At the risk of abstracting the identity into nonsense:

If: ECHR=the protection level of the ECtHR (variable), and CF_1 = the Charter's constituted protection level (a constant), and CF= the Charter's functional protection level (variable), and MS= the protection level of EU member's national law (variable); then:

$$ECHR \leq CF_1 \leq CF \leq MS$$

institutions could fashion a functional organizational structure from clear definitions of the institutions' relationships.

C. Conclusions: the Charter of Fundamental Rights

The IGC that created the Charter was approached by a wider set of actors than the Council of Europe during the creation of the ECHR. The contributions of non-state actors show that a general consensus existed in Europe that believed the Charter ought to expand or match the ECHR and be legally enforceable. Any dissent over these identities were marginalized or ignored. This paper cannot say whether these facts are reiterated in the IGC's internal deliberations.

However, the IGC's explanations for its final draft Charter reflected an approach based on adding together the rights of pre-existing treaties into a single document. By not replacing pre-existing treaties, the Convention constructed the Charter as a *supplemental* institution rather than an overarching institution.

Further, the Convention's explanations don't take the legal enforcement of the Charter for granted. By linking the Charter to the ECHR and the member states' collective constitutions, the Convention assumed that a legally enforceable Charter could coexist with other regional institutions if given a clear definition of their relationships.

Non-state actors wielded symbols of positive expansion to influence the internal deliberations of the IGC. Actors wielding symbols of negative or static expansion were undercut by other contributors. The IGC described its final document using symbols of pre-existing legal structures to expand the European regional human rights regime from within.

Therefore the *telos* of the Court that these actors assumed was to expand the protection of European human rights in cooperation with the ECtHR and the EU's member states.

iii. What it does and what it is: comparing the ECJ's functional and constitutive *teli*

European individuals, ECJ judges, the EU's organs, and national governments approached the ECJ as a supranational court with limited competences. Wielding the direct effect and the supremacy doctrine the Court defined its role within the European legal structure as the head of a monist hierarchy in a narrow area of law. Member states challenged this conception, and eventually complied with the Court's monist framework. This narrow, monist legal authority was the Court's internally identified *telos*.

Individuals, non-state organizations, the European organs, and national governments and parliaments approached the 1999-2000 IGC to expand human rights protection in the European region. Wielding additive symbols, these actors redefined the Court's role within the wider European legal structure as a member of a collective human rights regime. This wide, supplementary legal authority was the Court's externally identified *telos*.

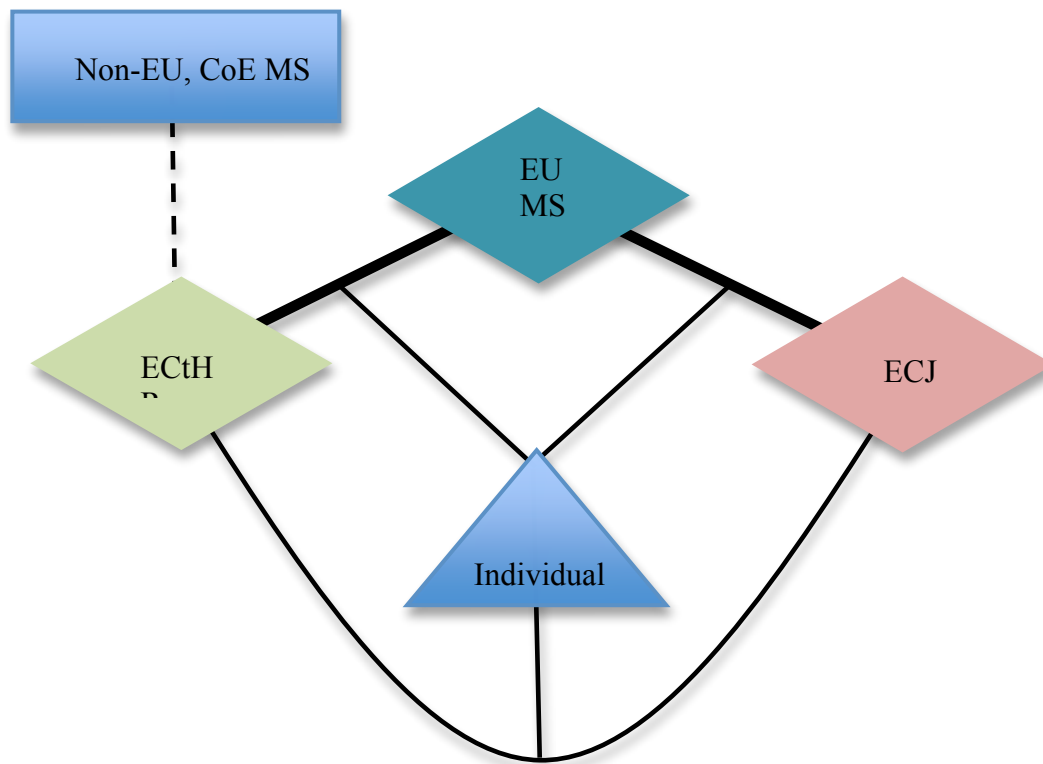
The Court's two *teli* are therefore currently divergent. The ECJ's functional *telos* defines itself as a regional hegemon in a small area of law. The ECJ's constitutional *telos* defines it as a regional partner in a large area of law.

This divergence of the ECJ's identity likely reflects the region's attempt to internally understand the meaning of the EU's institutional convergence on the Council of Europe. The Court recognized the ECtHR during its functioning as a regional counterpart, but kept its distance by restricting itself to its areas of competence. Now, however, the member states have

forced the ECJ to interact with the ECtHR on human rights issues. How the ECJ will internally adjust will likely define the future of the European human rights regime.

This chapter has shown the diverging externally and internally defined purposes of the ECJ. By examining the development of the direct effect and supremacy doctrines it showed that the Court internally defined itself at the head of a narrow monist legal framework. By examining the justifications of non-state and the IGC's proposals to the Charter this chapter illustrated that external actors define the Court as a supplemental jurisdiction within the collective legal structures of the European region. Chapter IV concludes this paper by relating this chapter on the ECJ to Chapter III on the ECtHR and developing a prediction for the future of the European human rights regime.

Chapter IV. How they relate: the European human rights regime today



The European human rights regime is marked today by the entanglement of two formerly parallel institutions and their jurisdictions. The first is the ECtHR, an intergovernmental court built on a broad European consensus that slowly expanded its jurisdiction into member state sovereignty in the area of human rights. The second is the ECJ, a supranational court with limited competences that operated in a monist legal hierarchy.

The promulgation of the Charter of Fundamental Rights in 2009 caused the ECJ to converge on the ECtHR. The Charter established an EU human rights regime that supplemented the ECHR with principles taken from the European Social Charters and the EU's legislation. The Charter externally redefined the ECJ's identity. Now, the ECJ and the European region will have to come to grips with this identity if the European human rights regime is to have clear boundaries and processes.

This concluding chapter first synthesizes Chapters II and III. It then makes a prediction on the future of the European human rights regime based on these findings.

i. Synthesis

Chapter II examined the internal and external identity-formation processes of the ECtHR. It examined the creation of the ECHR in the Council of Europe and the Court's jurisprudence to conclude that the ECtHR is a complementary jurisdiction that has gradually expanded its authority in the region.

Individuals approached the Council of Europe with the intention of creating a human rights body that granted individual access. When the United Nations failed to enact this body on a global scale, the Council of Europe built the institution on a regional scale. Delegates interacted with each other by debating over the definition of symbols fundamentally tied into that moment's regional-global relationship. When consensus was found, these delegates constructed a court that protected only those rights common to all Council of Europe members. They constrained the Court with intergovernmental mechanisms and language, but intentionally left the ECHR's language vague to allow for gradual expansion.

Individuals have increasingly relied on the ECtHR to protect their individual rights against their governments' actions. Judges developed the margin of appreciation doctrine and its proportionality tests. In the process they constructed an internal identity of the ECtHR as a complementary jurisdiction that is deferential to member states in broad areas of social morality. The Court has begun gradually narrowing its deference to states through the proportionality tests, but the ECtHR still oversees a complementary jurisdiction.

Chapter III examined the internal and external identity-formation process of the ECJ. It examined the Court's jurisprudence and the contributions to and from the 1999-2000 IGC to conclude that the Court internally identifies itself as the head of a narrow monist legal framework while the regional externally redefined the Court as a supplemental jurisdiction within the broader collective human rights legal framework.

Individuals, EU organs, and member states have relied on the ECJ to define the EU's relationship to individuals and states. Judges developed the supremacy and direct effect doctrines and constructed an internal identity of the Court as an overarching jurisdiction at the head of a narrow monist framework. Not only did the ECJ procedurally co-opt national courts to apply a wide breadth of community law, but it subsumed national constitutions' substance to even marginal community legislation. The ECJ has firmly established that, where the treaties provide competence, the Court has to have final jurisdictional authority.

Delegates from the EU, member state governments, and national parliaments entered the IGC with a large dossier of external opinion. Non-state actor's contributions to these dossiers expressed a general European consensus on fundamental questions of the Charter. By debating over certain socio-economic rights' inclusion and scope, the delegation did not believe that a debate over the Charter's enforcement mechanisms was necessary. The IGC justified the Charter as the codification of the region's historically expanding individual rights. It explicitly linked the Charter to the regional human rights regime by defining the Charter's relationships with pre-existing institutions. The 1999-2000 IGC identified the Court as a supplemental member of a broad collective system of regional human rights protection.

These two Chapters expressed how European actors perceived and understood the ontological realities of the European region after World War II through a regional legal system. The construction and functioning of the ECJ and the ECtHR were constrained and empowered by those identities that individuals, states, and international institutions had imbued the courts. Chapter II shows that the ECtHR is constrained from rapid human rights expansion by its intergovernmental identity- but is empowered by its longstanding legitimacy. Chapter III shows that the ECJ's internal supranational identity easily expands into member state authority in a narrow area of law- but is supposed to supplement rather than replace the human rights jurisdictions of the ECtHR and EU member states. Both Chapters showed that these identities were created from processes that defined relationships between structures that co-exist on the global and regional levels.

ii. Predictions

Now that the Lisbon treaty has expanded the EU into human rights law, where will the European human rights regime go?

This paper keeps its predictions narrow. It concentrates on the short to mid-term future (the next 2 to 5 years), primarily because this study does not capture the number of variables necessary for a mid- to long-term prediction. To make its prediction, this section first delineates the set of potential resolutions. It weighs their merits, and advances the most plausible future.

The first possible but rather unsatisfying resolution is the dissolution of the EU. The current financial crisis in Greece and impending crises in Ireland, Portugal, Spain, and the Balkan

states threatens to fundamentally undermine the Union's legitimacy and aggravate national euroskepticism in the founding states.³⁴² However, the potential of the economic situation spilling over into the human rights institutions is offset by the general trust that European citizens have in both the human rights regime and the EU's institutional adaptability. It is more likely that the EU would reduce its membership or its economic integration than completely fall apart.³⁴³

The second possible resolution is the absorption of the ECtHR by the EU. This would place the ECtHR within the EU's monist framework, most likely above the ECJ. However, this is impossible because of the non-EU member states who are members of the Council of Europe. Unless these states are removed from the ECtHR's jurisdiction they would have to be added to the ECJ's jurisdiction. If the Council of Europe or the EU's memberships are not reset, the ECtHR would have to construct a dual identity to become incorporated in the EU. The last decades' expansion patterns of the EU and the inherent schizophrenia required to make these propositions work preclude the viability of combining the ECtHR and the ECJ's jurisdictions.

The third possible resolution is the maintenance of the organizational status quo. Actors could construct a new symbol to represent how the Courts' relationship functions leave the ECJ to internalize its exogenous identity. Such a symbol would have a good deal of case law in both jurisdictions to rely on.³⁴⁴ However, scholarship and member state opinion focus on how the European Union regionalizes formerly national authorities and undergoes state-like

³⁴² This is currently stabilized as a relatively minor opinion. See European Commission. "Standard Eurobarometer 72" (Brussels: the European Commission, December 2009) p.34 accessed last 26 April 2010 at: http://ec.europa.eu/public_opinion/archives/eb/eb72/eb72_en.htm

³⁴³ Though, the EU may go the other direction and create a stronger bureaucracy to control interest rates and member state debt. Perhaps a bank comparable to the Federal Reserve will be created to provide emergency relief in the case of a potential member state default. This is all speculation, obviously.

³⁴⁴ See for example, in the ECJ: Case 4/73 *Nold v. Commission* [1974] ECR 491, and Case C-84/95 *Bosphorus Hava Yollari Turizm Ve Ticaret AS v Minister for Transport, Energy and Communications, Ireland* [1996] ECR I-3953; and, in the ECtHR: *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland* Judgment of 30 June 2005, Application 45036/98, *X, Y, and Z v. United Kingdom* Judgment of 20 March 1997, 581 ECR 667.

constitutional processes. This indicates that most delegates believe it unacceptable to settle for ambiguous institutional structures for very long. European actors will define when the ECJ defers to the ECtHR by constructing a symbol to reflect this definition but the status quo of the courts' overlapping jurisdictions will not remain for very long.

The fourth possible resolution is that the EU and the ECJ subordinate itself to the ECtHR in a monist human rights hierarchy. The ECJ in this view will maintain its supremacy in areas of the Union's sole competences, but will be subordinate to the ECtHR in the areas of the ECtHR's competence. The ECJ will refer cases that pertain to the ECHR to the ECtHR, and will adjudicate community cases itself.

The identities found in this study seem to indicate its validity. Europe has regional identified itself as on the forefront of global human rights regimes. The ECtHR has expressed a desire to expand its regional role. The EU has expressed a desire to make human rights more visible by pushing for the Union's accession to the ECHR. The ECJ has established itself as the head of a narrow monism. Member states of the Council of Europe and the European Union have expressed generally their acceptance of gradually increasing rates of expansion in the protection of human rights. Finally, individual Europeans have increasingly relied on both institutions to protect their rights from governmental interference but are wary of overly rapid regional integration.

This study therefore finds that the EU will first accede to the ECHR. Then, the ECJ will define the ECtHR's jurisdiction in the language of its narrow legal monism and construct a doctrine to reflect this definition. The ECJ will then defer to the ECtHR's supremacy in the ECtHR's area of competence while maintaining its own supremacy over national courts in its

sole competences. Most likely, the doctrine that the ECJ constructs to dictate when and how this deference occurs will incorporate concepts developed in the application of the direct effect and supremacy doctrines.

The ECtHR will not likely need to construct any major doctrine to accept cases from the ECJ. But it will accept cases whenever it can. The ECtHR may attempt to use the EU's accession and the subsequent influx of EU cases to justify a greater judicial activism in the ECtHR. However the ECtHR is constrained by the actions of the non-EU members of the Council of Europe, and their reactions to an EU accession will inform the ECtHR's behavior.³⁴⁵

Once the Lisbon treaty institutionally pans out and once the economic crisis is resolved, whatever EU member states are left will need some time to settle before regaining public motivation for further integration or expansion. Member states will only allow EU expansion into those states that the EU perceives as eventually becoming net-payers. If there is any opposition from Council of Europe member states to the activity of the ECtHR it will likely come from outside of the European Union.

Individuals in European states will use the Charter to engage their governments within community courts, and will begin to engage the Union in the ECtHR. Should individuals perceive that the human rights regime of the European Union and the European region can fully protect their rights, they may begin to identify with the concept of a European citizenship. Should individuals identify with a regional European identity, they may begin to accept the concept of a fully supranational Europe. While some commentators may already claim that the supranationalization of Europe's social identity has begun, this commentator does not think that the EU has passed the point of no return.

³⁴⁵ The recent foreign policy taken by Russia when it delayed protocol 14's ratification does not bode well for this proposition, but I am fairly certain that the judges, individuals, and the structures of the ECtHR are already internally reacting to Russia's actions.

The ECJ, the ECtHR, the EU, the Council of Europe, European states, and European individuals all continue to have the ability to wield symbols and reconstruct their definition of the European human rights regime. In the past they have expanded the human rights regime by building structures to support its growth and trimming areas that get overgrown. They are likely to continue to do so in the future. How these agents choose to separate the entangling limbs fundamentally rests on where they put the trellis and how they wield the shears. Hopefully, Europe can prevent one institution from choking the other out of existence.

Bibliography

Books

- Ansell, Christopher K. and Giuseppe Di Palma, eds. *Restructuring Territoriality: Europe and the United States Compared*. (Cambridge: Cambridge University Press, 2004)
- Arai-Takahashi, Yutaka. *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*. (Antwerp: Intersentia, 2001)
- Baimbridge, Mark, Brian Burkitt and Philip Whyman, eds. *The Impact of the Euro*. (New York, New York: St. Martin's Press, 2000)
- Christiansen, Thomas and Christine Reh, *Constitutionalizing the European Union* (New York, New York: Palgrave Macmillan, 2009)
- Chryssochoou, Dimitris N. *Theorizing European Integration*. (New York, New York: Routledge, 2009)
- Council of Europe. *Collected Edition of the "Travaux Préparatoires"* Vol. I./VII (The Hague, Netherlands: Martinus, Nijhoff; 1975)
- Craig, Paul and Gráinne de Búrca EU Law, Text, Cases and Materials (4th ed. ed.). (Oxford: Oxford University Press. 2007)
- Dunoff, Jeffery L., Steven R. Ratner, and David Wippman. *International Law: Norms Actors, Process: A Problem-oriented Approach*. (New York, NY: Aspen Publishers, 2006)
- Hix, Simon. *The Political System of the European Union*. The European Union Series, 2nd ed. (New York, New York: Palgrave Macmillan, 2005)
- Hurd, Ian. *After Anarchy: Legitimacy & Power in the United Nations Security Council*. (Princeton, New Jersey: Princeton University Press, 2007)
- Kantorowicz, Ernst Hartwig. *The King's Two Bodies: A Study in Mediaeval Political Theology*. (Princeton, N.J.: Princeton University Press 1957)
- Kaczorowska, Alina. *European Union Law*. (London, UK: Routledge-Cavendish, 2009)
- Lemmens, P and Wouter Vandenhole *Protocol no 14 and the reform of the European Court of Human Rights*. (Antwerp: Intersentia, 2005)
- Matscher, Franz, Ronald St. J. Macdonald, and Herbert Petzold, eds. *The European System for the Protection of Human Rights*(Boston, Massachusetts: Martinus Nijhoff, 1993)
- McCormick, John. *Understanding the European Union*. The European Union Series (New York, New York: Palgrave Macmillan, 2002)
- Menéndez-Alarcón, Antonio. *The Cultural Realm of European Integration: Social Representations in France, Spain, and the United Kingdom*. (Westport, Connecticut: Praeger Publishers, 2004)
- Mowbray, Alastair. *Cases and Materials on the European Convention on Human Rights*. Second Edition (Oxford, England: Oxford University Press, 2007)
- Ovey, Clare and Robin C.A. White, *Jacobs & White, The European Convention on Human Rights*, 3rd ed (Oxford: Oxford University Press, 2002)
- Nugent, Neil. *The Government and Politics of the European Union* 6th ed. The European Union Series (New York, New York: Palgrave Macmillan, 2006)

- Stone Sweet, Alec. *The Judicial Construction of Europe* (New Haven, Connecticut: Yale University Press, 2004)
- Spiermann, Ole. *Intentional Legal Argument in the Permanent Court of International Justice*. (Cambridge, UK: Cambridge University Press, 2005)
- Szczerbiak, Aleks and Paul Taggart. *Opposing Europe?: The Comparative Party Politics of Euroscepticism*. Volumes I and II. (Oxford: Oxford University Press, 2000)
- Weber, Katja, Michael E. Smith, and Michael Baun, eds. *Governing Europe's Neighbourhood: Partners or Periphery?* (Manchester: Manchester University, 2007)
- Zurchee, Arnold J. *The Struggle to Unite Europe: 1940-1958*. (New York, New York: New York University Press, 1958)

Articles

- Anonymous. "World Criminal Court Idea Bobs Up Again" *The Chicago Daily Tribune*. 16 April 1950
- Anonymous, "The Proceedings In the UN" *The New York Times*. 26 April 1950. Accessed last 29 March 2010 at: <http://select.nytimes.com/gst/abstract.html?res=...5F9>
- Anonymous. "Roman Herzog über seine Arbeit in einer EU-Kommission- 'Keine Debatte über Verfassung'" *Die Welt*. 12 February 2000, p 6. Accessed last 23 April 2010 at http://www.ena.lu/interview_roman_herzog_welt_12_february_2000-2-18315.
- Badinter, Robert. "Une Charte européenne, oui, mais laquelle?" in *Le Monde* 20 June 2000, p. 1. Accessed last 23 April 2010 at http://www.ena.lu/european_charter_yes_kind_monde_20_june_2000-2-18320
- Eriksen, Erik Oddvar and John Erik Fossum "Europe in Search of Legitimacy: Strategies of Legitimation Assessed" *International Political Science Review / Revue internationale de science politique*, Vol. 25, No. 4 (Oct., 2004), pp. 435-459
- Emerson, Michael, Senem Aydin, Julia De Clerck-Sachsse and Gergana Noutcheva. "Just What is this 'absorption capacity' of the European Union?" CEPS Policy brief, No. 113, September 2006
- Littman, David. "Universal Human Rights and Human Rights in Islam". *Midstream*, February/March 1999 at <http://web.archive.org/web/20060501234759>. Accessed 6 February 2010.
- Meehan, Elizabeth M. "European Integration and Citizens' Rights: A Comparative Perspective" *Publius*, Vol. 26, No. 4 (Autumn, 1996), pp. 99-121
- O'Donnell, Thomas. "The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights" (1982) 4 *Human Rights Quarterly* 474 at 496.
- Piket, Vincent. "EU Enlargement and Neighbourhood Policy" *Russian Regional Perspectives Journal* Vol 1 Issue 3. Accessed last 17 April 2010 at <http://www.iiss.org/programmes/russia-and-eurasia/copyof-russian-regional-perspectives-journal/rvp-volume-1-issue-3/eu-enlargement-and-and-neighbourhood-policy/>
- Schäffner, Christina, Andreas Musolff, and Michael Townson. "Diversity and Unity in European Debates" in *Conceiving of Europe: Diversity in Unity* (Brookfield, Vermont: Dartmouth University Press, 1996)
- Sørensen, Catharina. "Danish and British popular Euroskepticism compared: A Skeptical Assessment of the concept." (Copenhagen: Danish Institute for International Studies, 2004)

Voeten, Eric. "The Impartiality of International Judges: Evidence from the European Court of Human Rights" in *American Political Science Review* Vol. 102, No. 4 (November 2008)

Wendt, Alexander. "Anarchy is what states make of it: the social construction of power politics" *International Organization* 46, 2, Spring 1992. pp 391-425

Web sources

- Centre Virtuel de la Connaissance sur l'Europe), *The European Navigator (ENA)*. Accessed last 2 May 2010 at www.ena.lu
- Consilium "Decision-making in the European Union" at http://europa.eu/institutions/decision-making/index_en.htm. Accessed last: 31 March 2010.
- Council of Europe. "Regulations relating to the Appointment of the Secretary General" Accessed last 17 April 2010 at <https://wcd.coe.int/ViewDoc.jsp?Ref=RegulationsSG&Language=...=FFAC75>
- "Amendments to the Statute of the Council of Europe." Accessed last 16 April 2010 at <http://conventions.coe.int/treaty/en/treaties/html/001.htm#FN2>
- "About the Committee of Ministers" Accessed last 16 April 2010 at http://www.coe.int/t/cm/aboutCM_en.asp
- "Pace in Brief" accessed last 16 April 2010 at http://assembly.coe.int/Main.asp?Link=/AboutUs/APCE_structures.htm
- "All About the Congress" accessed last 16 April 2010 at http://www.coe.int/t/congress/presentation/default_en.asp
- "Overview of Activities" accessed last 17 April 2010 at http://www.coe.int/t/commissioner/Activities/overview_en.asp
- "Political Resolution of the Hague Congress (7-10 May 1948)" *Congress of Europe: The Hague- May, 1948*. (London-Paris: International Committee of the Movements for European Unity, 1948) pp. 5-7. Viewed at http://www.ena.lu/political_resolution_hague_congress_710_1948-2-12226 on 13 January 2010
- European Commission. "Standard Eurobarometer 72" (Brussels: the European Commission, December 2009) p.34 accessed last 26 April 2010 at: http://ec.europa.eu/public_opinion/archives/eb/eb72/eb72_en.htm
- European Community. "Presidency Conclusions - Cologne European Council (3 and 4 June 1999)" (Brussels: Council of the European Union, 23 March 2005). SN 150/99. Accessed last 24 April 2010 at http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/83201.pdf.
- The European Council. "Roman Herzog: biography" Accessed last 23 April 2010 at http://www.ena.lu/biography_roman_herzog
- *Draft Charter of Fundamental Rights: Note from the Praesidium*. (Brussels: 11 October 2000). Accessed at: http://www.europarl.europa.eu/charter/pdf/04473_en.pdf on 23 March 2010.
- European Court of Human Rights. HUDOC. Accessed last 2 May 2010 at <http://cmiskp.echr.coe.int/tkp197/search.asp?sessionid=43727640&skin=hudoc-en>
- European Court of Justice. *Curia Database*. Accessed last 2 May 2010 at <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en>
- *Eur-lex Database*. Accessed last 2 May 2010 <http://eur-lex.europa.eu/en/index.htm>.

- The European Movement. "The Objectives of the European Movement" at:
<http://www.europeanmovement.eu/index.php?id=6781> Accessed last 13 January 2010.
- European Parliament, Council Commission. *Joint Declaration of 05.04.1977 by the European Parliament, the Council and the Commission*. OJ C 103 of 27.04.1977, p 1. Accessed from
http://www.europarl.europa.eu/charter/docs/text3_en.htm on 18 November 2009
- European Parliament. *Resolution adopting the Declaration of fundamental rights and freedoms of 12.04.1989* (A2-3/89, OJ C 120 of 16.05.1989). and *Resolution on the Community Charter of Fundamental Social Rights of 22.11.1989* (A3-69/89, OJ C 323 of 27.12.1989)
- "What Form of Constitution for the European Union: Strategies and options to reinforce the constitutional nature of the Treaties" (Luxembourg: European Parliament, 1999). Accessed last 24 April 2010 at
http://www.europarl.europa.eu/charter/docs/pdf/poli105a_en.pdf
- "Members of the Convention responsible for drafting the Charter of fundamental rights (1999-2000)" (Brussels: European Parliament, 2005). Accessed last 24 April 2010 at
http://www.europarl.eu.int/charter/composition_en.htm.
- "Contributions forwarded to the Convention" Accessed last 24 April 2010
http://www.europarl.europa.eu/charter/civil/civil0_en.htm
- One World - Nations Online "Map of the European States" last modified: Thursday, 22 April 2010. Accessed last 1 May 2010 http://www.nationsonline.org/oneworld/europe_map.htm.
- Registry of the European Court of Human Rights. *European Court of Human Rights Survey of Activities 1959-1998, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, and 2007* (Strasbourg: 2000-2008) accessed last 11 April 2010 at
<http://www.echr.coe.int/ECHR/EN/Header/Reports+and+Statistics/Reports/Annual+surveys+of+activity/>
- Registry of the European Court of Justice. *Annual Report of the Court of Justice (1997-2008)*. (Luxembourg: 1998-2009) accessed last 11 April 2010 at
http://curia.europa.eu/jcms/jcms/Jo2_7015/
- Thorlakson, Lori. "Timeline of the European Union" at *Oxford University Press online*. (Oxford: Oxford University Press, 2010) Accessed last 1 May 2010 at
http://www.oup.com/uk/orc/bin/eupolitics/resources/timeline/timeline_pdf.pdf
- Valls, Raquel. "Withdrawal, expulsion and suspension of a member state of the Council of Europe" (Sanem, Luxembourg: Centre Virtuel de la Connaissance sur l'Europe) viewed in European Navigator, www.ena.lu, on January 13, 2010.